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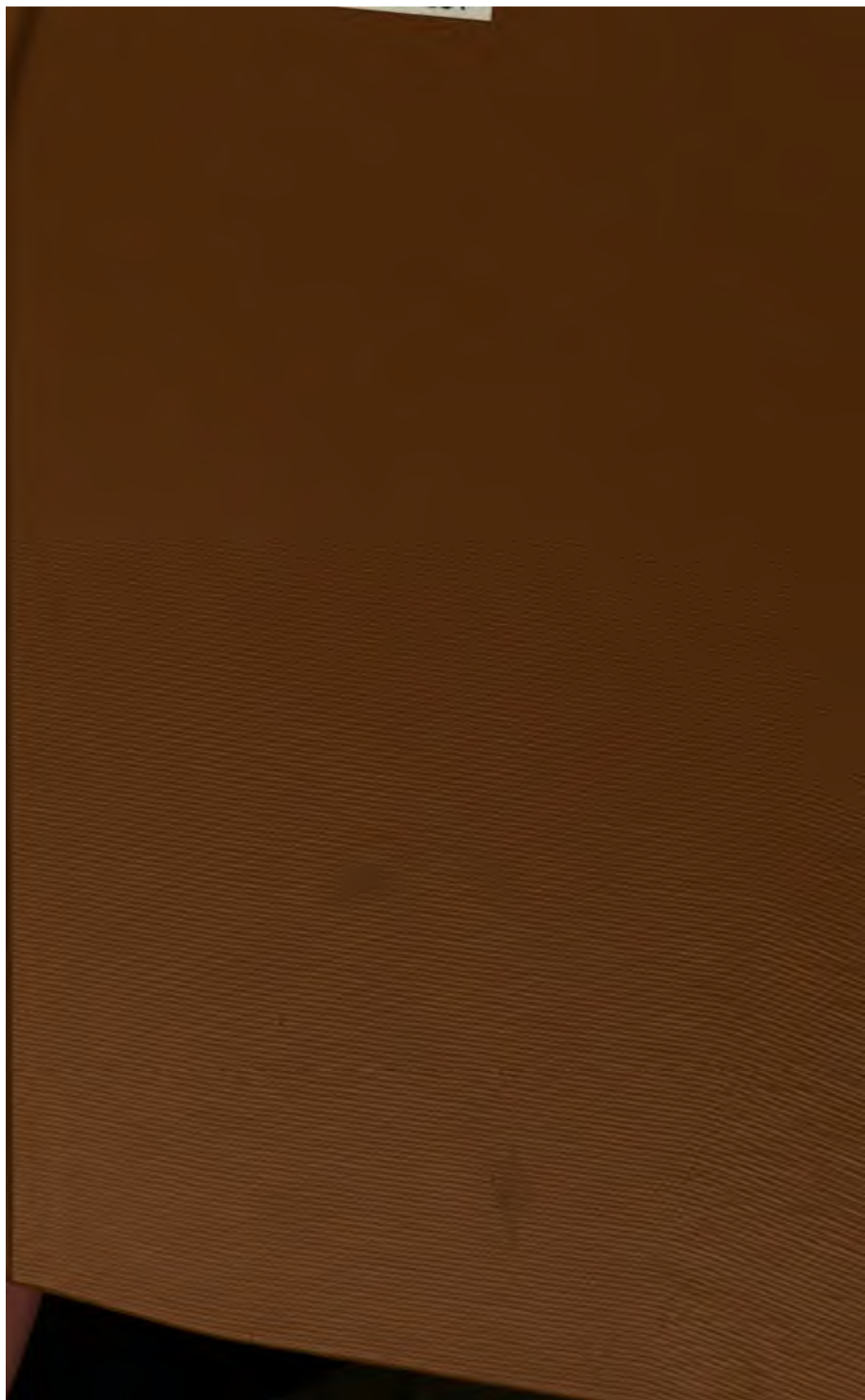
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77

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK.

BY

JOSEPH S. BOSWORTH,

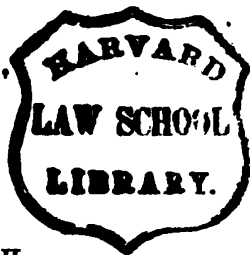
CHIEF-JUSTICE OF THE COURT.

VOLUME I.

ALBANY:

W. C. LITTLE AND COMPANY,
LAW BOOKSELLERS, 515 BROADWAY.

MDCCCXX.



Entered according to Act of Congress, in the year eighteen hundred and fifty-nine,
By WEARE C. LITTLE,
in the Clerk's office of the District Court of the United States for the Northern District of
New-York.

Rec Apl. 8. 1859

JUSTICES
OF THE
NEW YORK SUPERIOR COURT,
DURING THE TIME OF THESE REPORTS.

THOMAS J. OAKLEY, CH. J.,*	}	JUSTICES.
JOHN DUER, CH. J.,†		
JOSEPH S. BOSWORTH,‡		
MURRAY HOFFMAN,		
JOHN SLOSSON,		
LEWIS B. WOODRUFF,§		
EDWARDS PIERREPONT,§		
JAMES MONCRIEF,		

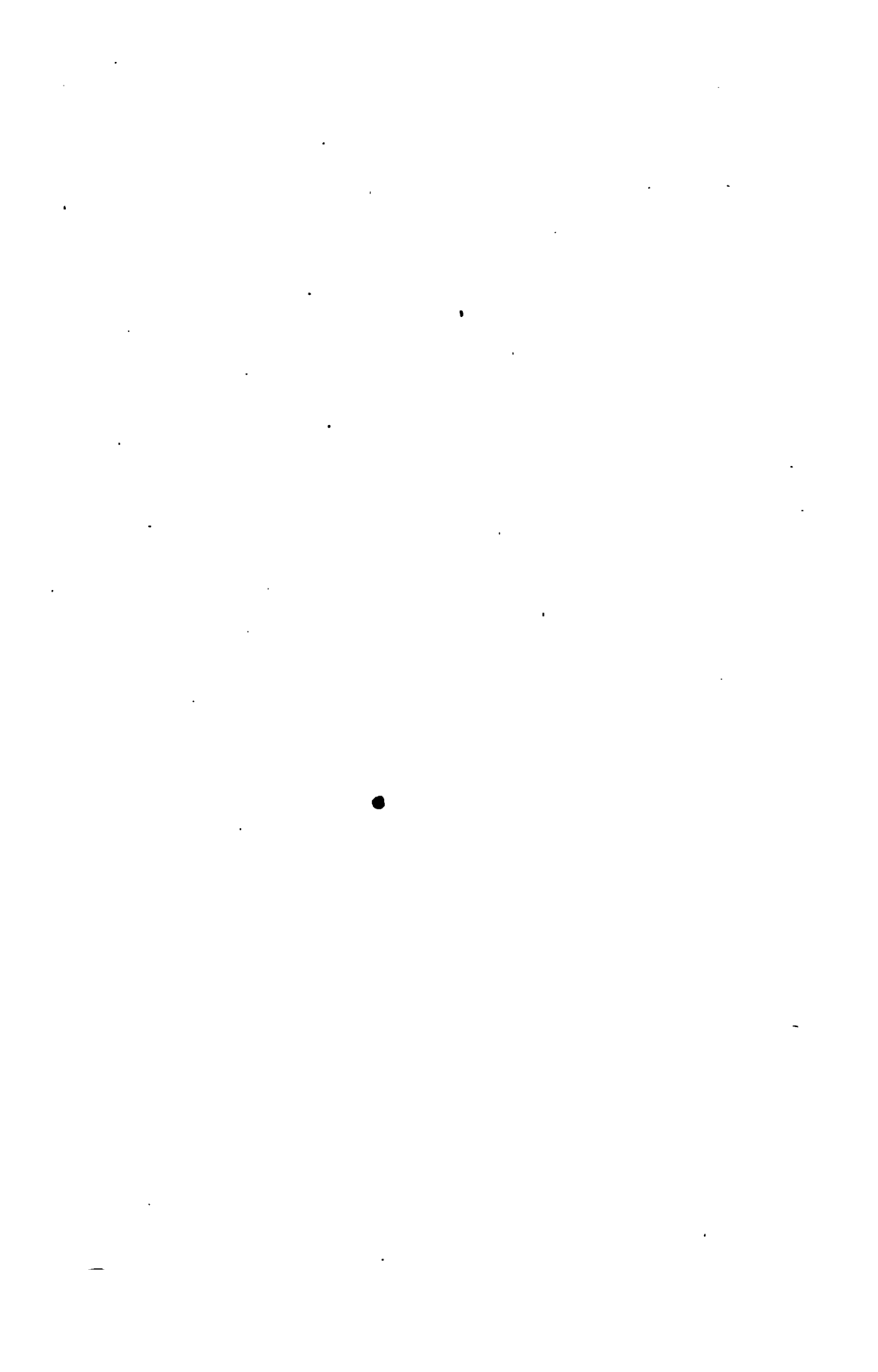
* Died May 11th, 1857. His term of office expired the 31st of December, 1857.

† Appointed CHIEF JUSTICE, May 16th, 1857. Died on the 8th of August, 1858. His term of office will expire on the 31st of December, 1859.

‡ Re-elected in November, 1857, for the full term of six years, commencing January 1st, 1858. Appointed CHIEF JUSTICE, on the 31st of August, 1858.

§ Elected in November, 1857, for the full term of six years, commencing January 1st, 1858.

|| Elected in November, 1858, to fill the vacancy caused by the death of CHIEF JUSTICE DUER, and for the residue of his term then unexpired. After the result of the election was ascertained, he was appointed by the Governor, to fill the vacancy, and entered on his duties the last of November, 1858.



P R E F A C E .

THE Sixth Volume of Duer's Reports, which was issued in October, 1858, brought down the decisions made at General Term, in Calendar Cases, to April, 1857. The present volume reports the decisions, in that class of cases, made prior to November term, 1857, with the exception of two or three, which will be reported in the next volume.

It is anticipated that another volume will be published within the next six months, and that such assistance has been secured as will make it practicable, after the lapse of a brief period, to issue the Reports, shortly after the decisions are rendered.

NEW YORK, Feb., 1859.



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C A S E S
ARGUED AND DETERMINED
IN
THE SUPERIOR COURT
OF THE
CITY OF NEW YORK
AT GENERAL TERM.

D. A. BUTTERFIELD, Plaintiff and Appellant, v. SPENCER, President of U. S. Express Co., *et al.*, Respondents.

When a written agreement has been duly made by and between two joint stock Express Companies (which they were competent to make) for the consolidation of the two companies and the merging of one of them in the other, by which agreement the one to be merged agrees to buy 2000 shares of the increased stock of the other, and which stock such other agrees to issue and sell for \$200,000, and by which the stockholders of the one to be merged are to have the right, *inter alia*, of becoming purchasers of such 2000 shares, in proportion to the amount of stock they hold in the company to be so merged, or to relinquish their stock to the company of which they are members and receive therefor such sum as they have paid on account of their subscription for the same and ten per cent. in addition thereto; and the company to be merged, on the making of such agreement, through S., its President, notified all of its stockholders of such agreement and of its provisions, and in such notice offered to each of them, his election of either of the several provisions made, by such agreement, for the benefit of such stockholders, and E., one of such stockholders, on the receipt of such notice and offer, wrote a letter to S. as such President, inclosing in it E.'s certificate of stock (being the only evidence he had of any right to stock in such company), and by such letter declared that he declined to become a purchaser of any part of said 2000 shares, and that he elected to take the amount he had paid on his subscription for such stock, and ten per cent. in addition thereto, *held*, that, the election tendered to E., by S., on behalf of the company of which he was such President, and the letter sent by E. to S. with the declaration of his election thereby communicated, was an offer by S. (on behalf of said company) to receive back E.'s certificate and pay him therefor, which, on being accepted by E. (by declaring his election to surrender his stock-certificate, and receive the sum so offered to be paid), became

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a binding contract, irrevocable, except by the mutual assent of E. and of the said company, as the parties to such contract.

Held also, that, G., to whom S., as such President, on the day of, and after the receipt of E.'s said letter, sold the stock which E. so declared his election to surrender (G. having bought and paid for the same in good faith), acquired a valid title to such stock as between himself and E. and as between himself and the plaintiff, who, subsequent to G.'s said purchase, took from E. an assignment of said stock-certificate and of E.'s rights as a stockholder in the said company.

It was also *held*, that, the fact that S., after offering to sell such stock to G., returned said stock-certificate to E., with a request that he would sign an endorsement written by S. thereupon, in these words, viz: "I authorize and require Charles C. Backus, Treasurer of the U. S. Express Company" (the Company to be merged), "to cancel the within receipt, and to issue, in its place, a new receipt for the same to such persons as Hamilton Spencer may direct"—and then return it to S., did not give and could not be regarded as having been intended to give, to E. a right to renounce the election he had made, or to treat the matter as opened for further negotiation:

Held also, that, S. having, under such circumstances, sold the stock to G., and the latter having paid for it, to the company of which S. was President, and the company having adopted the sale, and continuing to insist upon its validity, it did not lie with E., or the plaintiff as his assignee subsequent to such sale, to deny the authority of S. to make it.

Also *held*, that, although the consolidation agreement required S., within 24 hours after being notified by any stockholder of the company to be merged, of his election to surrender his stock, and that he declined to be a purchaser of any of the said 2000 shares, to give the like notice, in writing, to the trustees of the other company (who were named), and who agreed that, on that being done, they would take and pay for the stock of such declining stockholder, yet, whether S. neglected his duty, in not giving notice to said Trustees, in the manner and within the time prescribed by said agreement, of E.'s said election, is a question between such trustees and S. or the company of which he was President, and that its just determination did not affect the rights or liabilities of E., growing out of his acceptance of the offer made to him by the company of which he was such stockholder.

Held also, that, after such sale to G. of, and payment by the latter for, such stock as aforesaid, E. could not retract his said election and hold the stock, even though it was satisfactorily proved that a conversation was subsequently had between E. and S. at Rochester, in which E. avowed a purpose to retain the stock, and S. expressed his gratification thereat, saying at the same time that the condition of the stock had not been changed since E. had declared his said election, and could not be, until S. returned to New York; and hence, also *held*, that it was of no importance that the statement of the facts found by the judge who tried the cause, did not show whether he concluded such conversation to be what E. swore it was, or what S. swore it was; (their testimony in relation to it being in conflict.)

It was also *held*, that the plaintiff who purchased from E. the stock-certificate he held and his rights as a stockholder, after the transaction between S. and G. had been fully concluded, stands in no better situation than E. would have done, and did not thereby acquire any rights superior to those which E. possessed, at the time of such purchase by the plaintiff.

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Held also, that the plaintiff by inquiring of E., at the time of such purchase, why the unsigned endorsement, or power of attorney, was written on the back of said stock-certificate, and by being informed by E., in answer to such inquiry, "in substance of the reason why it was there," acquired a knowledge of facts, and of acts of E., which concluded E., and divested him of the power to reclaim the stock, and consequently that the plaintiff, as such purchaser, acquired no right to become a purchaser of any of said 2000 shares of stock, or to have any of it issued to him.

(Before BOSWORTH, HOFFMAN, and WOODRUFF, J.J.)

Heard January 25. Decided May 17, 1856.

THIS action was brought by David A. Butterfield, plaintiff, against Hamilton Spencer, individually and as President of the United States Express Company, and Alexander Holland, Treasurer of the American Express Company, and Henry Dwight, Jr., defendants.

It was tried before Mr. Justice Bosworth, without a jury, in April, 1856, who decided that the plaintiff was not entitled to the relief sought, and that the complaint should be dismissed with costs. From the judgment entered on the 3d of October, 1856, on such decision, the plaintiff appealed to the General Term. The complaint stated in substance, that shortly prior to February, 1853, a joint-stock company was formed, called the "United States Express Company," to carry money, packages, and property, and transact the general express business, and its principal office was in the city of New York. It consisted of over seven associates; its capital stock amounted, nominally, to \$500,000, divided into 5,000 shares of \$100 each. Receipts, for instalments called in and paid on each share, had been issued to the several stockholders, in the form of that issued to George Ely, one of the associates and the plaintiff's assignor, and which reads as follows:

"United States Express Company.

"Received of George Ely, Esq., One thousand dollars, being twenty per cent., the first instalment, upon fifty shares of the capital stock of the United States Express Company held by him, for which stock, scrip will be issued upon the surrender of this receipt.

"Dated, 4th February, 1853.

"C. C. BACKUS, *Treasurer.*"

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In 1850, a joint-stock company, called the "American Express Company," was formed, consisting of more than seven associates, and Alexander Holland is its treasurer, and its principal office is in the city of New York.

The defendant Spencer, at the time of the transactions subsequently detailed, was and is the President of the United States Express Company; Henry Dwight, Jr., was and is one of its directors; and the management of its business was committed to a board of directors.

The business of the two companies being the same, it was deemed for the interest of both that, they should be consolidated, and the United States Express Company merged in the American Express Company. To carry out that object, an agreement, (the validity of which was not called in question,) was entered into between the two companies, bearing date the 7th of March, 1853, which was executed "by John Butterfield" and six others, "trustees of the American Express Company, of the first part, and the defendants, Henry Dwight, Jr., and Hamilton Spencer, on behalf of the United States Express Company, of the second part."

By this agreement the United States Express Company was to buy, and the American Express Company was to issue, on or before the 30th of April, 1853, to the parties of the second part, for the stockholders of the United States Express Company, full scrip for 2,000 shares of the capital stock of the American Express Company, in such sums and for such persons as the parties of the second part should direct. The parties of the second part agreed to pay for said shares, on delivery of the scrip, \$200,000, of which \$100,000 was to be divided among those being stockholders of the American Express Company at the time of issuing said 2,000 shares of stock, ratably in proportion to the stock they then held. The other \$100,000 was to be held for the benefit of the then stockholders of the American Express Company, and such as should come in under said agreement. The parties of the second part agreed that, on the fulfillment of said agreement, the United States Express Company should be deemed merged in the American Express Company, and its separate organization given up; and that all the stockholders of the United States Express Company, who so desired,

might become purchasers of said 2,000 shares, in the proportion in which they might own stock in the United States Express Company on the 30th of April, 1853. That if any of them should decline to become such purchasers, "and should, within thirty days thereafter, give notice to said Spencer, who should, within twenty-four hours, notify the parties of the first part that they so declined," then the said parties of the first part agreed to become subscribers for the said stock, to an amount not exceeding \$100,000, held by the parties so declining, and repay to each the sum paid on each share of stock, being \$20, with ten per cent. on such sum so paid, and the stock in the American Express Company, which such persons so declining would have been entitled to under said agreement, should be issued to said parties of the first part, on their paying the balance, if any remaining to be paid, on the subscription to the stock of the United States Express Company. The stock to be issued under said agreement was to be of the increased stock of the American Express Company. Within thirty days after the 30th of April, 1853, a stock dividend of \$99,500 was to be made as follows: \$49,500 among those being stockholders of the American Express Company at the date of said agreement, and \$50,000 among those who might become stockholders under it.

The American Express Company, as thereby constituted, assumed all the property of the United States Express Company, and its value, at a sum agreed upon, was allowed as part payment of the undisposed \$100,000, of the purchase-money for the stock in the American Express Company. It was also alleged that the agreement contained other provisions which need not be stated. The complaint averred that both companies approved and ratified the agreement, and on the 30th of April, 1853, the \$100,000 which was to be divided among the stockholders of the American Express Company, was paid. That when the said agreement was made, \$20 had been called in and paid on each share of the stock of the United States Express Company; and to carry out said agreement, and pay certain general expenses already incurred, a further call of \$24 per share was made on its stockholders, payable on the 25th of April, 1853.

It also averred that the residue of said \$200,000 had been paid by the United States Express Company, and that the

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American Express Company proceeded, pursuant to said agreement, to issue scrip, or certificates of its increased stock, to such persons, being stockholders in the United States Express Company, as said Spencer and Dwight directed.

That when said agreement was made, George Ely, of Rochester, held a receipt or certificate, (a copy of which is already set forth.) That on the 23rd of April, 1853, the plaintiff bought it from Ely and paid him for it the full amount Ely had paid in, viz. \$1000, and a premium of \$500, and Ely, by an instrument in writing, assigned and delivered it to the plaintiff. It averred that the plaintiff, as such purchaser, became entitled to the benefit of said agreement, and to 20 shares of the increased stock of the American Express Company, as his proportion thereof. It averred that he offered on the 25th of April, 1853, to pay the said call of \$24 per share, and that the President and Treasurer of the United States Express Company refused to receive it, or to allow him to make the payment. That after the 30th of April, 1853, he required Spencer and Dwight to direct the American Express Company to issue to him, his proportion of the increased stock of the American Express Company, which they refused to do. That Spencer was notified of the plaintiff's purchase on the 23rd of April, 1853, and was requested by the plaintiff and by Ely to have issued, and the American Express Company was requested to issue, to the plaintiff his proportion of such increased stock. That Spencer has repeatedly refused to so direct, and the latter Company has declined to issue any stock to the plaintiff, on the ground that they had issued all which was to be issued, and to such persons as Spencer and Dwight had directed. It averred that the stock to which the plaintiff is entitled has been issued to, and stands in Spencer's name, and that in May, 1853, the American Express Company declared a dividend of 25 per cent., which entitles the plaintiff to five additional shares, which also stand in Spencer's name, and that said 25 shares are worth \$150 per share. The complaint prays, *inter alia*, for a judgment compelling the American Express Company to issue to the plaintiff 25 shares of its increased stock, and Spencer to surrender the scrip therefor issued to him, and that Spencer and Dwight be compelled to do whatever is necessary to accomplish this result, and that they pay the damages

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the plaintiff has sustained, to the amount of \$5000, and his costs of this action.

The defendant, SPENCER, who answered "both individually and as the President of the United States Express Company," and the defendant, Dwight, interposed an answer, and in and by it alleged that, by the terms of the agreement of the 7th of March, 1853, it was provided that the notice to be given by stockholders in the United States Express Company who might elect not to become purchasers of the stock of the American Express Company, should be given within 30 days after the delivery of that agreement, and not within 30 days after its date, as stated in the complaint, and that it was delivered on the 16th of March, 1853, and not before.

That on or immediately after the 16th of March, 1853, Spencer sent to Ely a letter or notice, stating the making of said agreement and its contents, (a copy of which is set forth in the answer,) and that Ely replied by a letter dated the 9th, and mailed the 14th of April, in which he declared his election not to become a purchaser of stock in the American Express Company and also declared his election to receive the instalment of \$1000, which he had paid into the United States Express Company, with 10 per cent. in addition thereto.

That Spencer received this letter on the 15th of April, 1853, and that there was inclosed in it, the said receipt or certificate, a copy whereof is hereinbefore set forth. That Spencer within 24 hours thereafter gave the notice required by the said agreement to the parties of the first part thereto, and Spencer was thereupon directed to inform James V. P. Gardner, of Utica, that he could have the stock Ely had declined to take. That on the 16th of April, 1853, Spencer telegraphed to Gardner accordingly, and stated that he must pay \$1100 to be entitled to the stock; and on the same day, Gardner, by telegraph, accepted the offer, and agreed to take the stock and remitted the \$1100 by mail to Spencer, which Spencer received on the 18th, and the same was credited on the books of the United States Express Company. That Gardner thereby became owner of said shares, and a stockholder in the United States Express Company, and on the 20th of April, 1853, paid the call of \$24 per share on the said fifty shares and on other shares held by him, and the treasurer there-

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upon issued a stock receipt to Gardner, dated the 25th of April, 1853, which stated that the United States Express Company had received from him \$6420, being 24 per cent. the second installment upon 267½ shares of the capital stock of said Company, "for which stock, scrip will be issued on the surrender of this receipt," and that such receipt was received by Gardner on said 20th of April, 1853.

That the sale was made to Gardner and the moneys received from him, and the said stock receipt was issued to him, solely by reason of Ely's said letter to Spencer of the 9th of April, 1853, and in reliance thereon, and without any notice that Ely intended to claim or exercise any right over said fifty shares of stock.

That after said offer was made to Gardner and on the 16th of April, 1853, Spencer wrote to Ely, acknowledging the receipt of his letter of the 9th of April, and informed him that the \$1,100 due to him was subject to his order, and would be paid as he should direct, and re-inclosed the said receipt, "with an authority endorsed thereon to transfer the same, and requesting said Ely to return the same, with his signature, to said authority, as a matter of convenience in doing the business."

That when the plaintiff offered to pay the call of \$24 per share, he offered to pay on condition of receiving from the United States Express Company a stock receipt for said fifty shares, and his demand was refused on the ground that the said shares had been sold to, and were owned by, Gardner, and that Ely had given notice of his election as hereinbefore set forth, and that the plaintiff was then so informed.

That the twenty-five shares issued to and standing in the name of Spencer, were issued to him, in terms, in trust, in order to close the arrangements between the two companies, and he claims no property therein; and that he told the plaintiff before this suit was brought, that he would not transfer it until the rights of the plaintiff and of Gardner to it were determined, and that in all the transactions detailed in such answer, Spencer has acted in his official capacity as President of the United States Express Company.

The answer put in issue the allegations of the complaint, as to the time of the plaintiff's purchase and the amount of consideration paid by him, and as to a demand by him upon Spencer to

direct the American Express Company to issue stock to the plaintiff, and that the plaintiff gave notice of his purchase on the 23rd of April, and avers it was not given prior to the 25th.

It insisted that Gardner is owner of said fifty shares, and as such entitled to the benefits of the said agreement between the two companies, and denied that said shares of the American Express Company's stock are worth \$150 each, or that the plaintiff has sustained, or is entitled to recover any damage. It insisted that Ely could not make any valid transfer of said fifty shares after having given the notice aforesaid, and after it had been acted on and the stock sold, as detailed in the answer, and prayed a dismissal of the complaint, with costs.

On the trial, and for the purposes of it, the necessity of proving the tender, demand, and refusal mentioned in the complaint, was waived by the defendants. It was proved that the agreement, dated the 7th of March, 1853, was delivered on the 16th of that month. Its seventh paragraph is in these words, viz. "If any of the stockholders of the United States Express Company shall decline to become purchasers of the stock of said American Express Company, under this contract, and shall, within thirty days after the delivery hereof, give notice to Hamilton Spencer, at 170 Broadway, in the city of New York, who shall, within twenty-four hours after, give the like notice, in writing, to the parties of the first part, at their office, No. 10 Wall street, New York, that they so decline: the parties of the first part shall become subscribers for the stock of the United States Express Company, to an amount not exceeding \$100,000, held by the persons so declining, and shall repay, to each, the sum he has already paid in on such stock, being the sum of \$20 on each share, together with ten per cent. on such sum paid in, and the stock in said American Express Company which such person would have been entitled to under this contract, shall be issued to said parties of the first part upon their paying the balance, if any remaining to be paid, on the subscriptions to the stock of the United Express Company."

The certificate of the 4th of February, 1853, hereinbefore copied, was also produced and read in evidence.

The notice of the 16th of March, 1853, which Spencer sent to Ely, was produced and read in evidence. It was proved that Ely

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received it on the 9th of April, 1853, and it reads as follows, that is to say:—

“New York, March 16, 1853.

“To GEORGE ELY, Esq.:

“SIR:—An arrangement has this day been made between the United States Express Company and the American Express Company, for their union.

“The stockholders of the U. S. Express Company, by the contract, become the owners, on the 30th April next, of two thousand shares of stock in the American Express Company, which divides the stock equally between the stockholders of the two companies.

“The U. S. Express Company pay for the stock thus bought, \$200,000, one-half of which is divided amongst the present stockholders of the American Express Company, and the residue remains in the treasury for the joint benefit of all concerned. The stock to be issued and paid for on the 30th of April next.

“Within thirty days after the 30th of April next, a stock dividend of \$50,000 is to be made and divided among the stockholders of the U. S. Express Company, and a like dividend to the stockholders of the American Express Company, making the whole stock \$500,000, equally divided between the stockholders of the two companies.

“If any stockholder of the U. S. Express Company shall decline to become a purchaser of the stock of the American Express Company, under this arrangement, he shall, within thirty days from this time, give notice in writing to Hamilton Spencer, at the office of the U. S. Express Company, 170 Broadway, New York, that he declines, and send back his receipt for the instalment paid by him; and thereupon the amount of the first instalment paid, with ten per cent. in addition thereto, will be refunded to such stockholder.

“Or, if any stockholder prefer, he may, within thirty days, give notice, at the same place, to Mr. Spencer, that he elects to sell his portion of the \$200,000 of stock receivable pursuant to this arrangement, and send with the notice a power of attorney to said Spencer to transfer the same. Within one year, such stockholder is guaranteed that each share of said \$200,000, of

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stock issued, shall produce \$125. The individuals of the American Express Company who give the guaranty being entitled to take the stock sooner if they choose, and being credited towards the price of \$125 per share, with all cash and stock dividends which may be received in the meantime. Those who elect to sell upon these terms are not at liberty afterwards to sell their stock, except with the consent of the guarantors, and the stock in the meantime remains in the hands of said Spencer, as the mutual depository of the parties. This guaranty is given by John Butterfield, James D. Wasson, Wm. G. Fargo, E. P. Williams, and Johnston Livingston, and is believed to be perfectly good.

"The personal property, leases, etc., of the U. S. Express Company, are transferred, at cost, to the new company thus formed.

"To enable the U. S. Express Company to carry out this contract, and to pay certain general expenses already incurred, a further call, of \$24 per share, is made upon the stockholders of the U. S. Express Company, payable on the 25th of April next.

"It will be seen that the arrangement now stated offers to each stockholder of the U. S. Express Company his choice of either of three courses:

"1. To now withdraw from the company, receiving back the whole amount paid, and ten per cent. in addition.

"2. To receive his share of the stock bought, with the right to elect immediately to sell it at \$125 per share, payable within one year in the manner stated.

"3. To hold his stock, receiving such profits as the business may hereafter afford.

"The directors believe that the arrangement now made will prove more advantageous to the stockholders than a contest between the companies could have done, involving, as such a contest must necessarily, a large expenditure of money, which once paid out could not have been recovered.

"Suitable forms for notices are appended for such as may elect to avail themselves of them.

"By order of the Board of Directors.

"H. SPENCER,
"President U. S. Express Co."

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It was also proved that said notice, when sent to and received by Ely, had appended to it the following "forms for notices," viz.

"To HAMILTON SPENCER, Pres't U. S. Express Co.,
170 Broadway, New York.

"Take notice that I decline to become a purchaser of stock in the American Express Co., pursuant to the contract made between that company and the United States Express Co., and that I elect to receive the sum of \$——, being the first instalment paid on —— shares of stock held by me, with ten per cent. in addition to such instalment.

"Dated, 1853."

"To HAMILTON SPENCER, Pres't U. S. Express Co.,
170 Broadway, New York.

"Take notice that I elect to sell to John Butterfield, James D. Wasson, William G. Fargo, Elijah P. Williams, and Johnston Livingston, so much of two thousand shares of stock in the American Express Company, agreed to be issued to the stockholders of the United States Express Company, as I may be entitled to as a stockholder of the U. S. Express Co., at the price of one hundred and twenty-five dollars per share, payable within one year from the first of May, 1853.

"And I hereby authorize you, upon the receipt of the price aforesaid, to transfer such stock to said persons, or their assigns, you, in the meantime, and until such payment is made, retaining possession of such stock for me, and immediately upon the receipt of such price, remitting the same to me without charge for your services.

"All cash or stock dividends received by me upon such stock, before such transfer is made, are to be allowed as part payment of said price of one hundred and twenty-five dollars.

"Dated, 1853."

It was proved that, in reply to such notice, Ely, on the 14th of April, 1853, mailed to said Spencer a letter, which the latter received on the 15th, and which reads thus:

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"To HAMILTON SPENCER, Pres't U. S. Express Co.,
170 Broadway, New York,

"Take notice that I decline to become a purchaser of stock in the American Express Company, pursuant to the contract made between that Company and the United States Express Company, and that I elect to receive the sum of one thousand dollars, being the first instalment paid on fifty shares of stock held by me, with ten per cent. in addition to such instalment.

"Respectfully yours,

"GEORGE ELY.

"Dated, Rochester, April 9, 1853.

"Inclosed I send said receipt for instalment of one thousand dollars, on my subscription to the stock of the United States Express Company."

Evidence, as to Spencer's having given notice to John Butterfield and others within twenty-four hours after the receipt of Ely's letter of the 9th of April, 1853, declaring his election as aforesaid, was given by both parties. The sale to Gardner was proved, as stated in the answer of Spencer and Dwight, and also that Gardner paid for the fifty shares as stated in such answer, and also that he paid the further call of \$24 per share, and that there was issued to him the certificate, or receipt, as stated in such answer.

Spencer's letter to Ely, returning the certificate to him, was put in evidence, and reads thus:—

"170 Broadway, 16th April, 1853.

"GEO. ELY, Esq.

"Dear Sir:—Your favor of the 14th inst., inclosing notice, is just received. Please sign the inclosed power on the back of the receipt and return to me, and on its receipt a check for \$1100 will be sent you.

"Very respectfully,

"H. SPENCER."

The power written on the back of the certificate when so returned to Ely reads thus:—

"I authorize and require Charles C. Backus, Treasurer of the

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U. S. Express Co., to cancel the within receipt, and to issue in its place a new receipt for the same to such persons as Hamilton Spencer may direct.

"10th April, 1853."

Ely replied to Spencer's letter, of the 16th of April, by a letter dated the 20th of April, 1853, which letter Spencer did not receive till several days thereafter, being, when it reached New York, in the western part of said State. Such letter reads thus:—

"Rochester, April 20th, 1853.

"HAMILTON SPENCER, Esq.

"Dear Sir:—Your favor of the 16th inst. was duly received. Since the receipt of your letter, I have determined to hold my Express stock, and shall therefore forward the instalment of \$1200, in compliance with the call of the Treasurer. You will, therefore, please send back my notice requiring a return of the first instalment, or consider it annulled and inoperative.

"Respectfully yours,

"GEORGE ELY."

George Ely was examined under a commission, as to what was said at an interview between him and Spencer, on the 21st of April, 1853, at Rochester, as the latter was returning from the western part of the State to New York City. It was admitted that Abraham P. Ely was present at such interview, and would testify as George Ely did. The testimony of the latter, on that point, is as follows:—

"On the 21st day of April, the defendant, Spencer, was in my office in Rochester, and after I had replied and mailed the letter stating my intention to retain the stock. During this interview, I stated to Mr. Spencer that I received his letter of the 16th, returning my certificate,—that I had decided to retain my stock, and should be prepared to meet the call of the Treasurer for the second instalment, due on the 25th, and that I had written, to him to that effect the previous day.

"Mr. Spencer replied, by expressing entire concurrence and satisfaction in this determination. Said he should be pleased to have me remain a stockholder in the company, and was glad I

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had decided to retain my stock ; that it would be good property to hold, and would pay liberal dividends.

"My brother, Abraham P. Ely, was present in my office during this interview, and was in a situation to hear what passed between us.

"During the conversation, Mr. Spencer did not say, intimate, or allude, in any way or manner, to his having transferred, or to his having left directions with any persons to transfer, dispose of, or re-issue said stock to any one in his absence. He stated that the condition of the stock had not been changed, and would not be while he was away ; that no alteration or transfer of the stock to another could be made without his direction, and that he had made no disposition whatever of my stock previous to his leaving New York, and that it still stood in my name, where it would remain, as I desired."

Mr. Spencer's testimony as to that interview was as follows:—

"I had an interview with George Ely and Abraham P. Ely at Rochester, just at evening, on the 21st of April, 1853. It was on my return from Buffalo. I had business to transact with Abraham P. Ely, who was the agent of the United States Express Company, to pay him off, and close his connection with the company. After completing that settlement, just as I was leaving the office for the cars, George Ely mentioned to me that he had arranged, or concluded, or determined to retain his stock, I cannot give his exact words. I replied 'have you' (or substantially so) 'I am glad to hear of it, for I think you will find the stock profitable, and I should be glad to have the original subscribers make the profits, if any.'

He talked a little further in regard to the probable profitability of the stock, and then I left. Not a word was said in regard to the condition of the stock not being changed, nor about the stock standing in his name, nor in regard to this ; that a transfer of the stock would not, and could not, be made in my absence, or that I had made no disposition of the stock. Nothing whatever was said as to the stock during this conversation, except at the commencement, when Ely said he had arranged, or concluded, or determined, to keep the stock. I did not say that the condition of the stock had not been changed, and would not be,

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in my absence, or that it could not be in my absence. I did not tell him I had made no disposition of the stock, or that it still stood in his name. I am as certain of this as I am of my own existence. Nothing whatever was said on any of these subjects."

On the cross-examination the witness testified :—

"I made no other communication to Mr. John Butterfield in regard to Ely's declining the stock than what I have stated. I have a very distinct recollection of that conversation of the 21st of April; my attention was called to it the next week, on my return to New York. I state that these things were not said, both from distinct recollection that they were not said, and because I know they could not have been said without my recollecting, nor without my telling Ely a falsehood. I have three reasons for saying that no such conversation took place:—

"First. It would have been a lie, and I know I did not tell him a lie; second, it would have been inconsistent with what I then inferred he had done in my absence; third, I distinctly recollect that no such things were said."

George Ely wrote a letter to Spencer, which was read in evidence, and bore date the 25th of April, 1853, and which stated in substance that the plaintiff, on the previous Saturday, through an agent at Rochester, made Ely an offer for his stock in the United States Express Co., which he had accepted, and that he had assigned to the plaintiff his receipt and interest in his subscription, adding, "he will therefore pay the instalment called for to-day." It assigned as Ely's reason for selling, that he believed it judicious to accept the offer made to him. Spencer received this letter on the 27th of April, 1853, at New York, and it was post-marked at Rochester on the 26th of April.

There was also produced, proved, and read in evidence, the guaranty mentioned in the letter or notice of the 16th of March, 1853, sent by Spencer to Ely, which guaranty bears the date last named, and was delivered contemporaneously with the said agreement of the date of March 7, 1853. Said guaranty read as follows:—

"We, whose names are hereto subscribed, do hereby, for a valuable consideration, guaranty and agree to and with Hamilton Spencer, President of the United States Express Company, and

with each stockholder of the United States Express Company, electing to avail himself as hereinafter provided in this agreement, that so much of two hundred thousand dollars of stock in the American Express Company this day agreed to be sold to the stockholders of the United States Express Company, as the holders of such stock may elect to dispose of, pursuant to this agreement, shall produce to the holders thereof, respectively, within one year from the first day of May, 1858, the sum of one hundred and twenty-five dollars per share.

"The stockholders of the United States Express Company, to whom such stock is to be issued shall, on or before the 16th day of April next, give written notice that they intend to avail themselves of this guaranty; such notice to be delivered to Hamilton Spencer, at the office of the United States Express Company, 170 Broadway, New York, who shall, within twenty-four hours thereafter, give a like notice to the undersigned, at their office, No. 10 Wall street, New York, that they desire to sell their proportion of such stock, and, thereupon, the subscribers shall be bound to take such stock at any time within said year, at the option of the undersigned, and pay for the same at the price aforesaid.

"But no stockholders, giving such notice, shall be at liberty thereafter to sell such stock, except with the consent of the subscribers or their authorized agent, and, upon the completion of the sale, the subscribers shall be credited towards the said price of one hundred and twenty-five dollars per share, with all cash or stock dividends and earnings received by such stockholders, and shall be bound to pay only such sum as, together with such cash or stock dividends and earnings, shall be equal to said price of one hundred and twenty-five (\$125) dollars per share.

"The subscribers shall have the right to take such stock at the price aforesaid, at any time within said year that they shall choose.

"Every stockholder of the United States Express Company giving notice as aforesaid, shall thereby become a party to this contract, severally, and may enforce the same in his own name and for his own benefit, so far as relates to stock actually held by him.

"At the time such stockholder gives notice as aforesaid, each person so giving notice shall deposit with said Spencer, his stock, duly endorsed, so as to authorize its transfer to the subscribers

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when they pay for the same, and said Spencer shall deliver the same upon receiving payment therefor as aforesaid.

"Dated March 16, 1853.

JOHN BUTTERFIELD.

JAMES D. WASSON.

WM. G. FARGO.

E. P. WILLIAMS.

JOHNSTON LIVINGSTON."

Other testimony was given, which it is unnecessary to state. The facts, found by the court, at special term, and its conclusions of law thereon, are as follows:

DECISION OF THE COURT.—The United States Express Company and the American Express Company, were consolidated at the time, in the manner, and by the agreement and acts stated in the complaint. By the agreement of the 7th of March, 1853, the time for the stockholders of the United States Express Company to notify Spencer, that they declined to become purchasers of the stock of the American Express Company, was, thirty days after the delivery of such agreement, which took place on the 16th of March, 1853.

George Ely, of Rochester, who was an original subscriber for fifty shares of the capital stock of the United States Express Company, by a letter directed to Spencer, dated April 9, 1853, and received by the latter on the 15th of said April, notified Spencer that he declined to become a purchaser of stock in the American Express Company, and that he elected to receive \$1,000 being the first instalment paid on the fifty shares held by him, with 10 per cent. in addition, and in such letter inclosed and sent to Spencer the receipt of the 4th of February, 1853, which had been given to Ely when he paid the first instalment, the form of which is, as stated in the complaint. Spencer within twenty-four hours after receiving such notice and receipt, in order and with intent to notify the parties of the first part to the agreement of the 7th of March, 1853, that Ely had so declined, was about leaving his office to go to the office of said parties at No. 10 Wall street, to serve them there, with a notice, in writing, that Ely had so declined, when John Butterfield one of said parties entered the office of said

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Spencer, who then informed said Butterfield that said Ely had so declined, and exhibited to him the said letter from said Ely. It was then agreed by said Butterfield and Spencer, that James V. P. Gardner of Utica, N. Y. might become a purchaser of said stock, if he desired to do so, all which occurred within said twenty-four hours. It was also then and there agreed that Spencer should send a telegraphic dispatch to said Gardner to the effect that he could become a purchaser of fifty shares of said stock. Such a telegraphic dispatch was then and there written and handed to said Butterfield to be forwarded by him, as he was a Director in the telegraphic company and could transmit the dispatch without charge to said Gardner and the same was by Butterfield forwarded to said Gardner. Gardner received the same on said 16th of April: He replied by telegraph to Spencer, the same day, accepting the offer, and the same day mailed to Spencer a bank-draft for \$1,100, to pay the first instalment and ten per cent. thereon, which was received by Spencer on the 18th of April, who obtained thereon the amount thereof.

Ely, by notifying Spencer that he declined to become a purchaser of stock in the American Express Company, and by sending back with such notice his receipt for the instalment paid by him, and by the acts of Spencer in giving notice thereof, as aforesaid, within twenty-four hours thereafter, to said John Butterfield, and selling the stock to Gardner, pursuant to the said agreement between Spencer and Butterfield, divested himself and was deprived of all right and power to reassert any rights as owner of said stock, or to make any valid sale or disposition thereof. To this the plaintiff's counsel excepted.

Spencer's letter to Ely, of the 16th of April, 1853, inclosing in it the receipt, for the purpose of having Ely sign the power of attorney drawn on the back of it, gave Ely no right or power to renounce the election declared in his letter of the 9th of April. To this the plaintiff's counsel excepted. The conversation between Ely and Spencer, at Rochester, on the 21st of April, after Gardner had bought the stock, and paid one thousand one hundred dollars on account of it, could not operate to annul the rights which Gardner had acquired by his purchase, or to restore to Ely any rights or power of disposition over the stock. To this the plaintiff's counsel excepted.

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The plaintiff bought with such notice of the previous acts of Ely as made it his duty to inquire in relation to them, and his position is no stronger than it would have been had he inquired and ascertained the actual facts. To this the plaintiff's counsel excepted.

Gardner's equities are superior to those of Ely, and the plaintiff has no rights in the premises, other than those Ely could have asserted and enforced, if he had not made any transfer to the plaintiff, and was himself seeking the relief which the plaintiff seeks to obtain in this action. To this the plaintiff's counsel excepted.

The plaintiff is not entitled to any of the relief prayed for in his complaint, and the bill must be dismissed with costs. To this the plaintiff's counsel excepted.

Judgment having been entered upon the decision, the plaintiff appealed from it to the General Term.

J. E. Burrill, for Appellant.

L. E. Birdseye, for Respondents.

BY THE COURT. WOODRUFF, J.—It is not denied on the part of the appellant that the defendants, the United States Express Company, had, under the articles of their association, authority to enter into the act of consolidation with the American Express Company which has given rise to the present controversy, and no question is made of the entire validity of the agreement entered into for that purpose; nor is it doubted that the respective associations, "The United States Express Company," and "The American Express Company," in their respective aggregate or associate capacity, were in all respects bound by the provisions of that agreement.

It appears by the complaint herein, and by the seventh paragraph of the agreement for consolidation set forth in the "case," that it was expressly agreed, on the part of "The United States Express Company," that they would take 2,000 shares of stock in the American Express Company, and pay therefor to the latter the sum of two hundred thousand dollars, to be divided as therein specified. To the performance of this stipulation the United

States Express Company were unqualifiedly bound. But, for the relief and benefit of the United States Express Company in their associate capacity, as well as for the relief of such of their stockholders as might prefer to withdraw from the association and not become contributors to the funds requisite to enable the latter to perform their agreement, it was also provided as follows,—“if any of the stockholders of the United States Express Company shall decline to become purchasers of the stock of the American Express Company, under this contract, and shall, within thirty days after the delivery hereof, give notice to Hamilton Spencer” (the then President of the United States Express Company), “at 170 Broadway, in the city of New York, who shall, within twenty-four hours after, give the like notice in writing to the parties of the first part,” (seven individuals described in the agreement as trustees of the American Express Company), “at their office, No. 10 Wall street, New York, that they so decline, the parties of the first part shall become subscribers for the stock of the United States Express Company, to an amount not exceeding \$100,000, held by persons so declining, and shall repay to each the sum he has already paid in on such stock, being the sum of \$20 on each share, together with ten per cent. upon such sum paid in, and the stock in said American Express Company which such person would have been entitled to under this contract shall be issued to said parties of the first part, upon their paying the balance, if any remaining to be paid, on the subscriptions to the stock of the United States Express Company.”

The true construction of this agreement has a very important bearing upon the effect of the election afterwards made by Ely, the assignor of the plaintiff herein.

It is observed, therefore, that, irrespective of the stipulation that in a certain contingency the seven trustees would take and pay for stock of declining stockholders to the amount of \$100,000, the United States Express Company were bound to take and pay \$200,000, for 2,000 shares of the stock of the other association.

To this they were bound, whatever might be the amount of stock held by their declining stockholders, whether greater or less than the amount of \$100,000, which, upon certain conditions, the trustees agreed to take; and they were so bound whether the

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condition, upon which the trustees should become bound to take any of the stock, was complied with or not.

The obligation assumed by the said *trustees* was conditional; to bind *them* to take the stock two things were made essential conditions precedent, viz. that the declining stockholders should, within thirty days, give notice to Hamilton Spencer of their election to decline becoming purchasers of the stock of the American Express Company; and that he, within twenty-four hours thereafter, should give the like notice in writing to the said trustees.

If the stock held by persons so declining amounted to more than \$100,000, then the trustees were not bound to take the excess, but the United States Express Company, (composed of the persons who continued to be stockholders under the arrangement), must take and pay for such excess; and if no notice was given to the trustees within the twenty-four hours mentioned in the condition, then the United States Express Company, by the express terms of the agreement, were bound to receive and pay for the whole \$200,000 of stock in the American Express Company, unaided by any contribution thereto by such trustees.

The United States Express Company had thus, in its associate capacity assumed a heavy responsibility, looking primarily to its several stockholders for the contributions necessary to enable the Company to perform the agreement, but securing the privilege, (in case any of its stockholders should elect not to become parties to the purchase and contribute accordingly) of calling upon the trustees to aid to the extent of \$100,000, by taking stock of declining stockholders to that amount.

The importance of this view of the construction of the agreement is this: that it appears, thereby, that the United States Express Company, in its associate capacity, had a deep interest in the election about to be tendered to the individual stockholders therein, and were in a condition to become parties to such election, when tendered and acted upon by the several stockholders. In the first instance, that Company on the one hand and the individual stockholders making their respective elections on the other, were the proper parties to the contract which was to result from such election.

It is not material, in the views entertained of this case in

other respects, to determine whether this Company was *bound* to give the notice, within the twenty-four hours, to the trustees, or to permit the trustees to take the stock of their declining stockholders without such notice; for if they were so bound, then it is conceived to be quite clear, that, upon a binding election to withdraw being declared by any stockholder, the right of the trustees, to the stock, instantly attached, and the obligation of the Company to permit the trustees to take and pay therefor precluded any revocation of the election so declared.

And if not so bound—and that appears to be a construction best according with the provisions of the agreement—the Company were at liberty to give the notice to the trustees within the twenty-four hours stipulated in the condition, or to forego the benefit of that privilege and perform their agreement, unaided by any contribution from the trustees; and in such case the Company, acting in this respect on behalf of the stockholders, who did elect to continue such and pay their proper contributions, would hold or dispose of the stock, of the declining stockholders, as they thought proper; and in this, there was no technical difficulty founded in the idea of a surrender of the shares to the Company collectively, since the agreement of consolidation itself plainly contemplated the extinction of all the stock of the United States Express Company, and the issue of stock of the American Express Company, in lieu thereof, to such persons as the first named Company, by Dwight and Spencer acting on their behalf, should direct.

In every aspect of the agreement, therefore, it was the United States Express Company, in its associate or aggregate capacity, which had assumed the obligation to pay the \$200,000, and, in view of that obligation was interested, primarily and chiefly, if not exclusively, in the election which was about to be offered to the respective stockholders therein. And this rendered it eminently proper to provide that the person who was to receive notice of the election, to be so tendered and declared, should be Hamilton Spencer, the President of the Company, and that he and Dwight, on the behalf of the Company, should direct to whom the stock in the American Express Company should be issued.

Nor is there any difficulty, in this view of the rights and posi-

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tion of the United States Express Company, arising from the fact that it was about to deal and did deal with the individual members of its own association. Whatever difficulty, if any, might exist at law, there is none in equity in regarding the Company as acting in this respect on behalf of, or as in truth consisting of, such stockholders as should continue to hold stock under the agreement for the consolidation, and should contribute thereto.

With this condition of the rights and responsibilities of the United States Express Company, the action of that company, by its Board of Directors, (as appears by the notices issued), was in precise correspondence. By order of the board, Spencer, as President, notified the stockholders of the fact of consolidation and of its material provisions, and offered to each stockholder his election to become a purchaser of stock in the American Express Company under the arrangement, or to decline and return his receipt for the instalment he had paid upon his stock, with the assurance that if, within thirty days, he gave notice in writing to Spencer, at the Company's Office, the amount of such instalment, with ten per cent. in addition thereto, would be refunded to him. They thus became the direct and immediate parties to the election tendered, and to the offer of repayment. Whether the trustees, of the other company, would be required to make the repayment or not was not ascertained, and if at all required, the extent, to which the obligation, by the trustees to take to the amount of \$100,000, would suffice to cover the stock of declining parties, could not be ascertained. The offer of the election and the offer to repay to the stockholder was, therefore, in this stage of the transaction, a matter simply and only between the Company and its stockholders respectively. And such was in form, substance, and effect, the circular notice issued by the President of the Company, by order of the Board, as set forth in the case herein.

The result of these views seems quite inevitable. The notice sent by the Company to Ely was an unequivocal offer, in which his choice was tendered to him to come in under the new arrangement and share its burdens and responsibilities, with the chance of its profits, or to withdraw from the enterprise, with the assurance that if he declined to become a purchaser of the new stock, and should, within thirty days,

give notice that he so declined, and send back the receipt he held, for the instalment already paid, he should receive the amount of such instalment, with ten per cent. in addition. The acceptance of this offer completed a contract between the parties. Within the thirty days Ely wrote to the President of the Company, in the most unequivocal manner, declining to receive stock in the American Express Company, and electing to receive back the sum of \$1,000 (the instalment paid by him), with ten per cent. in addition thereto, and in consummation, on his part, of all that he could do to make his acceptance of the Company's offer perfect, he returned, to the Company, the receipt held by him, as the voucher for such instalment, and the only evidence in his possession, of his claim to any stock in the Company.

These transactions constituted a contract, binding upon both parties. An offer by the one, duly tendered to the other, and by the latter unconditionally accepted: and from the time of such acceptance the contract was irrevocable, except by mutual assent, Ely, on the one hand, could insist upon its performance by the Company, and for the same reason he was bound, beyond the power, (of his own mere will,) to retract his acceptance.

Such a condition of things between two individuals would present no question open to discussion. That an offer thus communicated by letter, when accepted by letter, becomes a contract binding according to the terms of such offer, and binding upon both parties, is not doubtful. Although doubt has formerly been suggested as to the precise moment when an acceptance takes effect, *i. e.*, whether on forwarding the letter of acceptance, or on its receipt by the party making the offer; even that is not now doubtful in this State since the decision of *Mactier v. Fröh*, 6 Wend. 103; and before that decision, it was clear that such offer made and sent, followed by an acceptance duly received, constituted a complete and binding contract, irrevocable by either party.—See cases cited in the above case, Story on Cont's, § 384, and cases cited in the notes.

It does not appear to us necessary to discuss at length the question, whether the enclosing of the receipt to Ely, with a request to him to sign the power of attorney endorsed thereon, gave Ely any right to revoke his assent to the sale, or indicated

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any dissent therefrom, by Spencer, on behalf of the Company. In our view, it was a ratification, or rather a recognition of the fact, that the contract was mutually assented to. Though it was not strictly necessary, that any such power of attorney should be signed, it was requested, for the convenience of the Company, and as a suitable voucher to them, in their subsequent use or disposition of the stock. The receipt was not returned to Ely as an opening of the matter for further negotiation. The act and the letter accompanying the receipt, both proceed upon the idea that the contract had been entered into, and that its actual performance was in the contemplation of the parties. We fully concur in the decision at Special Term upon this point. The act neither gave, nor was intended to give to Ely a right to renounce the election he had made.

Such being the respective rights of the Company and Ely, the stock or the privilege of coming into Ely's place, as a subscriber was actually sold by Spencer to Gardner, who paid the sum of \$1,100 therefor to the Company. Whether Spencer, as President, had the authority, on behalf of the Company, to make the sale to Gardner or not—he did make such sale, and the Company received the money and adopted the sale. They set it up as their defence herein. It does not lie with Ely or his assignee to deny that authority. So whether it was the duty of Spencer to give the notice to the trustees of the American Express Company within twenty-four hours, and tender the privilege to them, is a question between the trustees and Spencer, or the trustees and the U. S. Express Company. Although the questions were raised on the argument of the appeal, whether Spencer did sufficiently offer the stock to the trustees, and whether he sold it to Gardner by their consent, it is, for the reasons stated, unnecessary for the purposes of the decision to answer them. If by the agreement of consolidation the trustees acquired a right to the stock of a declining stockholder, whether Spencer gave them the written notice or not, then most clearly that right became fixed the moment Ely's election was duly declared—and if the right of the trustees depended upon their being notified by Spencer, then a sale, by the Company, without giving the trustees any notice, should not be complained of by such trustees, and was at the option of the Company. Much more

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then was the sale to Gardner conclusive upon Ely if the trustees consented thereto.

As before suggested, the Company, in our opinion, acquired a full right to the stock the moment Ely elected to accept the offer which Spencer as President tendered to him, and we now add that after the sale to Gardner, Ely could not retract and claim the stock, whatever may have been the purport of the conversation between Spencer and himself on the 21st of April. In regard to that conversation there is a conflict of evidence. The testimony of the two parties thereto presents it in a very different aspect. The finding of the court does not explicitly state to which of them credence was given, but it will suffice to say, that, for the reasons above stated we quite agree with the conclusion at special term, whichever of the two parties be taken to give the more accurate account of what occurred,

If these views are correct the judgment at special term must be affirmed.

It is proper however to add, that, in relation to the plaintiff, we are entirely agreed that he stands in no better situation, in this controversy, than his assignor Ely would have done. At the time of the alleged sale to him, by Ely, the plaintiff's agent examined the power of attorney upon the certificate, which Spencer had forwarded to Ely for his signature, and inquired the cause of its being there, and was then informed by Ely "in substance of the reason why it was there." If so, then the plaintiff, by his agent, knew of the very facts which under the opinions above expressed, concluded Ely and deprived him of the power to reclaim the stock.

True, Ely says, he also informed him of his conversation with Spencer, but as before remarked, that conversation would not avail to reinstate Ely in the ownership of the stock, and although, the fact, of a sale to Gardner, was not known to Ely or to the plaintiff's agent, there was enough to put him on inquiry by which he would have learned the true condition of the matter.

The judgment should be affirmed.(a)

(a) This case, not having been reported in its order, is reported now, as it is believed that, the omission to report it was not in consequence of a conclusion that it did not involve questions of interest or importance.

RMP.

Hurlbut v. Post

**P. H. and J. D. HURLBUT v. R. H. POST, impleaded with
RYERSON.**

An instrument in writing, by which one party "agrees to let for one year from its date" certain premises, and by which the other party agrees to pay the stipulated rent quarterly, and declaring that the "agreement shall continue in force and effect for one year from the date hereof," operates as a lease, *in presenti*.

When one person enters into a contract with two others by name, without knowing or having at the time any reason to suspect that they have a partner in the business to which such contract relates; in a suit upon such contract the two with whom it is made may alone be sued, and it is not necessary to make their partner, if they had one, a party. As to such a transaction, and under such circumstances, he may be treated as a dormant partner, although the plaintiff knew before suit brought that the two had such a partner at the time the contract was made.

When a lessee, not being permitted to take possession of the whole of demised premises, nevertheless enters into possession of the residue, and occupies and enjoys such residue, and pays full rent for two quarters without claiming a deduction, and is sued for the third quarter's rent, he cannot set up the fact that he at no time had possession of the whole, as a bar to the action. Such a withholding of a part is not an eviction, nor a matter of equivalent effect. He must pay for the part he has enjoyed, upon the principle of a *quantum meruit*.

When the lessor, in a lease to two persons as lessees, agrees to render services of a stipulated character, for the lessees during the lease, for a commission, and the lessees, before the expiration of the lease, dissolve their co-partnership, and thenceforth each prosecutes the same business on his own account and solely for his own benefit, such lessor is not bound to render the stipulated services for only one of such lessees, and his neglect or refusal to do so is no bar to an action to recover subsequently accruing rent, nor will it give to either of such lessees a right of action which can be interposed as a counter-claim in a suit against the two to recover such rent.

Nor will the fact of such dissolution, and an agreement between the lessees that each shall thenceforth occupy separately a distinct portion of the demised premises, accompanied by such separate and several enjoyment, of themselves and alone, affect the lessor's right to maintain an action against such lessors jointly, to recover the rent which, by the lease to them, they stipulated to pay.

(Before OAKLEY, Ch. J., and BOSWORTH and HOFFMAN, J.J.)

Argued February 18th, and decided April 11th, 1857.

This action comes before the Court at General Term, on an appeal by the plaintiffs from a judgment against them in favor of the defendant, Post. It was brought by Peter H. and John D. Hurlbut, against Russel H. Post and John Ryerson. The

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complaint alleged that the plaintiffs, on the 15th of August, 1854, "demised and leased unto the defendants certain premises, to wit, an office in the third story of No. 84 South street, for one year from the date aforesaid, at the rate of \$600 per annum, payable quarterly, and under and by virtue of said demise, the defendants entered into possession of said premises, and by reason of said demise and possession, the defendants became indebted to the plaintiffs, on the 15th day of May, 1855, for the sum of \$150, for the quarter ending at that date, and though requested, the defendants have not paid the same, nor any portion thereof.

"Wherefore the plaintiffs demand judgment against the defendants, with interest and the costs of this action."

The defendant, Russel H. Post, alone answered, and alleged, *First*, that the demise mentioned in said complaint was made to the defendants and Benjamin Dunning jointly, and not to the two defendants alone. *Second*.—Post, for a further and separate answer, "denies the said indebtedness, in manner and form as set forth in the complaint, or in any other way or manner."

Third.—An eviction of the defendants and Dunning, after they had entered into the demised premises, under said demise, and on or about the 1st of September, 1854, by the plaintiffs, from a part of the premises, and a continuance of such eviction during the residue of the term.

"*Fourth*.—The said defendant Post, for a further and separate answer, says the defendants' and said Dunning's obligation to pay rent, by the terms of the said demise, was subject to a condition precedent, to be performed on the part of the plaintiffs, which condition was not performed on the plaintiffs' part, but was broken in this, to wit: the plaintiffs undertook, and promised the defendants and said Dunning, to procure for them freights, both foreign and coastwise, for such vessels as the said defendant and Dunning might put up; and that they would use their best efforts to promote the interests of said defendants and Dunning with respect to such vessels, during the whole term of said demise. This defendant Post says, that the plaintiffs fulfilled that agreement for a short time after the making of said demise, that is to say, for about three months, and from that time wholly neglected their duty in that behalf, and for the residue

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of said time used all their influence and efforts to divert freights and business from the defendants, and thereby damaged this defendant Post at least one thousand dollars, as this defendant Post states on information and belief. And the plaintiffs, by violating their duty in that behalf, by the terms of said demise, precluded themselves from all right to demand rent. And so this defendant Post says the plaintiffs are not entitled to recover in this action, and he demands judgment against them, that the said complaint be dismissed with costs."

"The plaintiffs reply to the answer of the defendant, and deny that the terms of said demise were subject to the condition precedent, to be performed on the part of the plaintiffs, or that the same was broken, as in the said answer is stated, or that the defendant has been damaged, by the non-fulfilment by the plaintiffs of any agreement on their part to be performed, in any amount whatever."

The action was tried before MR. JUSTICE WOODRUFF and a Jury in March, 1856. Elisha D. Hurlbut was sworn as a witness for the plaintiffs, and was shown an unsealed agreement, which, as he testified, was executed by the parties and signed by himself as a subscribing witness. The plaintiffs offered it in evidence; the defendant Post objected on the ground that "said paper was not a lease, or instrument under seal, and was a mere agreement for use and occupation, which objection was sustained by the Court, and said agreement was excluded. Whereupon it was agreed by the parties to go to trial on the merits, and that the complaint and answer should be deemed amended, so as to conform to the merits, as the same should be established by the proofs." The said paper or agreement was then read in evidence to the jury, and is as follows, viz:

"Memorandum of an agreement made this fifteenth day of August, 1854, between John D. Hurlbut and P. H. Hurlbut, of the firm of Hurlbut & Co., of the one part, and Post & Ryerson of the other part. The said Hurlbut & Co. agree to lease unto Post & Ryerson the office in the third story of 84 South street, (heretofore occupied by E. D. Hurlbut & Co.) for the term of one year from the date hereof, at the rent of (\$600) six hundred dollars per annum, payable quarterly. And the said Post & Ryerson shall also have the use and privilege of all the office and

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furniture, reserving to the said Hurlbut and Co. the privilege of two desks to transact their own business.

"And the said Hurlbut & Co., promise and agree that they will procure freights, both foreign and coastwise, for such vessels as may be put up by said Post & Ryerson, and that they will use their best efforts to promote the interests of the said Post & Ryerson with respect to such vessels.

"And the said Post and Ryerson, on their part, agree, that they will hire the said office on the conditions above named, and also will pay the said Hurlbut & Co., as compensation for their services, an amount which will be equal to one-fifth of the net commissions (after paying brokerage thereof) of all outward, foreign, and coastwise freights, and of outward, foreign, and coastwise charters, on all vessels put up to load outward by the said Post & Ryerson.

"It is, however, expressly understood between the parties to this agreement that, nothing herein contained shall be construed to prevent the said Hurlbut & Co. from transacting any business they shall think proper, which shall not injure or interfere with the business of the said Post & Ryerson, or the obligation of the said Hurlbut & Co., under this contract, to promote their interests.

"Signed this day and year first above written.

"It is mutually agreed that this agreement shall continue in force and effect for one year from the date hereof."

It was proved that the defendants occupied the premises in the third story of 84 South street from the 1st of February to the 1st of May, 1855. They had all that story except two desks in the portion partitioned off in the rear.

On the cross-examination of this witness, some evidence was given tending to show that the defendants and Dunning were partners when the above agreement or lease was executed; but whatever may be its effect in that behalf, it did not tend to show that the plaintiffs knew, or had reason to suspect that Dunning was a member of the firm of Post & Ryerson.

The plaintiffs then read in evidence an agreement between Post and Ryerson, dated the 6th of January, 1855, by which Ryerson sold and assigned all his interest in the firm of Post & Ryerson to Post, including "all and singular the lease of the office in the building number 85 South street, retaining an inte-

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rest in the office number 84 South street." To that agreement was annexed a written memorandum in these words, viz:

"MEMORANDUM.—It is agreed that J. H. Ryerson is to have the use of three desks in the front office of 84 South street, until expiration of the lease to Post & Ryerson. The three desks are to be the first three back desks on the north-easterly side of the office, as named verbally: when R. H. Post and others connected with him leave the said office finally, the said J. H. Ryerson to have the full privilege of all the said office, as far as R. H. Post has power in the premises, and also all claim that B. Dunning may have to said premises. It is understood that R. H. Post will vacate the office 84 South street as soon after the 1st May next as he can obtain possession of the office 85 South street, after a reasonable time to fit it up for use, and when he so vacates the office 84 South street, the said Ryerson is to have entire possession of the whole house and premises.

Witness,

E. H. OWEN,

New York, 6th January, 1855."

RUSSEL H. POST,

JOHN H. RYERSON.

The plaintiff next read in evidence, a notice published in the New York Journal of Commerce, of the Dissolution of the Partnership of Post and Ryerson, and of the new partnership of Post, Smith & Co., as follows:

NOTICE.—The firm of Post and Ryerson has been this day dissolved by the mutual consent of the parties interested. The business of the late firm will be liquidated and settled by either member of the firm, at their former place of business, 84 South street.

New York, Dec. 29th, 1854.

RUSSEL H. POST,

JOHN H. RYERSON.

The undersigned have this day formed a Copartnership, for the transacting of a general shipping and commission business, under the firm and name of Post, Smith & Co.

New York, Jan. 1st, 1855.

RUSSEL H. POST,

W. JAMES SMITH,

BENJ. DUNNING,

The plaintiffs then rested.

Evidence was given by the defendant, Post, as to the manner in which the demised premises had been occupied from the date of the lease. It appeared that the premises consisted of a front and back office, the defendants and their clerks occupying the former, and the plaintiffs the latter. So much of the evidence, as bears upon the question whether the plaintiffs had at all times exclusive possession of the back office, and as relates to efforts of the defendants, or of either of them, to have more use of it than they actually enjoyed, as is deemed material, is stated in the opinion of the Court.

It appeared that Ryerson and one William Laytin, and Peter H. Hurlbut, one of the plaintiffs, formed a partnership about the 1st of January, 1855, under the name of Laytin, Ryerson & Hurlbut, for the prosecution of the same business as that conducted by Post, Smith & Co.

It appeared that Post and Ryerson, prior to their dissolution, had obtained a lease of 85 South street. After their dissolution, and after the formation of the two new firms, and until Post, Smith & Co. moved into No. 85 South street, the latter firm occupied the front office of No. 84 South street, and Laytin, Ryerson & Hurlbut the back office. From the time of the formation of such new firms, the plaintiffs rendered no services in procuring freights for Post, but, on the contrary, as he alleged and attempted to prove, they solicited business for the firm of Laytin, Ryerson & Hurlbut, to Post's damage, individually, and as a member of the firm of Post, Smith & Co. It was admitted that, the defendants paid to the plaintiff full rent up to the 1st of February, 1855.

The testimony being closed, the Counsel for the plaintiffs requested the Court to direct a judgment for the plaintiffs, upon the ground that there was no evidence of the non-joinder alleged in the answer, or of any eviction of the defendants, or of any breach of contract, or any evidence of damage to the defendants by a non-fulfilment of the contract between them and the plaintiffs.

The Court refused so to direct, and charged the Jury

FIRST—That the plaintiffs were bound to join Dunning as defendant, if he was one of the co-partners comprising the firm of Post & Ryerson, at the time of making the agreement of August 15th, 1854, and that membership was open and notorious, and

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was, in fact, known to the plaintiffs. And, if they so found, then, that the defendants were entitled to a verdict, upon the defence, set up in the Answer; that the said Dunning was not joined as a defendant.

To which plaintiffs' Counsel excepted.

SECOND—That if the plaintiffs withheld from the defendants a portion of the premises, beyond the use of the two desks mentioned in the agreement, without the consent of the defendants, and against their will, from February 1st, 1855, to May 1st, 1855, such withholding entitled the defendants to a verdict.

To which plaintiffs' Counsel excepted.

THIRD—That the plaintiffs were not at liberty, (unless the defendant Post discharged the plaintiffs, or assented to their discontinuing their services,) after the dissolution of Post and Ryerson, and the transfer by the latter to the defendant Post, to interfere with the business of the defendant, Post, by engaging in an opposition to the defendant Post, in the same business, and, by lending their services to a rival house and soliciting and procuring freight for themselves, or the new firm of Laytin, Ryerson & Hurlbut, to the injury of the business of the defendant Post. And if they did so without his consent, and against his will, they were liable to the defendant, Post, and in the amount of damage which he sustained by their doing so, and that such damage should be allowed to the defendant.

To which the plaintiffs' Counsel excepted.

That the rent was not divisible, and must be fixed at the amount mentioned in the agreement, of \$150 per quarter. The Court further directed the Jury to return answers to the following interrogatories, to which the Jury returned answers in writing as to the several questions propounded, viz.

FIRST—Was Benjamin Dunning a member of the firm of Post and Ryerson, by whom the agreement for the premises in question was made, and was that fact known to the plaintiffs at the time of the commencement of this suit?

ANSWER BY THE JURY—Yes.

SECOND—Did the plaintiffs withhold from the defendants a portion of the premises, (beyond the use of the two desks mentioned in the agreement), without the consent of the defendants, and

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against their will? If yea, did that withholding continue from 1st February, 1855, down to the 1st May, 1855?

ANSWER BY THE JURY—Yes.

THIRD—Did the plaintiffs perform their agreement in relation to procuring freights, down to the time of the dissolution of the firm of Post & Ryerson?

ANSWER BY THE JURY—Yes.

FOURTH—Did the defendant, Post, at, or at any time after that dissolution, discharge the plaintiffs from such performance, or assent to their discontinuing such services?

ANSWER BY THE JURY—No.

FIFTH—Did the plaintiffs refuse or neglect to render the services stipulated in that agreement, after such dissolution, and the assignment by Ryerson to Post of the co-partnership property?

ANSWER BY THE JURY—Yes.

SIXTH—Did the plaintiffs interfere with the business of Post from and after the 1st of January, 1855, by procuring freight for themselves, or the new firm of Laytin, Ryerson & Hurlbut, to the injury of the business of the defendant, Post?

ANSWER BY THE JURY—Yes.

SEVENTH—If yea, what damages were sustained by defendant, Post, by reason thereof.

ANSWER BY THE JURY—\$150.

To all which questions the plaintiffs' Counsel objected.

TO THE FIRST—On the grounds elsewhere stated, that it is immaterial, and that there was no evidence whatever that the plaintiffs had any knowledge that Dunning was a member of the firm.

TO THE SECOND—That there was no evidence of such withholding; the evidence being express, that the defendants always continued in possession of the same premises which they originally took, and for which they continued to pay, without objection, to February 1st, 1855.

TO THE THIRD—That there was no evidence introduced to show or tending to show, any failure to fulfil the agreements on the part of the plaintiffs, before the dissolution.

TO THE FOURTH—That it was immaterial—the performance of the agreement having been rendered an impossibility by the dissolution, which was the voluntary act of the defendants.

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TO THE FIFTH—On the same grounds as the preceding, and on the ground that there was no evidence of any demand on the part of Post, or refusal on the part of plaintiffs.

TO THE SIXTH—On the same grounds as the preceding, and on the ground that the dissolution of the agreement dissolved any obligations of the plaintiffs to the defendant, Post.

TO THE SEVENTH—On the same grounds as the preceding, and on the ground that there was no evidence as to damages.

The Case was then submitted to the Jury, who found a verdict for the defendant, and returned written answers to the first, second, third, fifth, and sixth interrogatories in the affirmative, and an answer to the fourth interrogatory in the negative, and in answer to the seventh interrogatory, the sum of one hundred and fifty dollars, as above answered in writing by the Jury.

On the 18th of June, 1856, a judgment was entered under the direction of the Court, in favor of the defendant, Post, against the plaintiffs for \$150 damages, and his costs of the action. From that judgment the plaintiffs appealed to the General Term.

C. A. Nichols, for Pt'fs and Appellants.

E. Seeley, for Def't Post; Resp't.

BY THE COURT. BOSWORTH, J.—The instrument of the 15th of August 1854, signed by the plaintiffs and defendants, is a lease for one year from its date, and the plaintiffs should have been allowed to read it in evidence, under their complaint.

Hallett v. Wylie, 3 J. R. 44; *Thornton v. Payne*, 5 id. 74.

If the plaintiffs did not know, when that agreement was made, that Dunning was a member of the firm of Post & Ryerson, he may be treated as a dormant partner, and they are not obliged to make him a defendant. They contracted with Post & Ryerson alone, and there being nothing in the style of their firm to indicate that any other person was a member of that firm, and the plaintiffs having no notice at the time of contracting, of any such fact, it was not necessary for them to make him a defendant.

N. Y. Dry Dock Co. v. Treadwell, 19 Wend. 525; *Clarkson v.*

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Carter, 3 Cow. 84; *Clark & Bissell v. Miller & Loeve*, 4 Wend. 628; *Mitchell v. Dall*, 2 Har. & Gill. 159 and 171-2.

The evidence does not justify the finding of, and the jury have not, in fact, found an eviction. At most, there was an unreasonable persistency on the part of the plaintiffs in objecting to Post & Ryerson's putting an additional desk in the back office: The defendants acquiesced to this extent. They paid full rent for a time subsequent to their dissolution, without claiming or asking a deduction on account of it: There was no application; by either of them after that dissolution, to the plaintiffs, for leave to put more desks in the back office, nor any complaint that they had not been permitted to do so.

A reference to the testimony shows very clearly, that the action was tried on the theory, that the evidence tended to show, and that the defendant *Post*, was endeavoring to prove, that from the date of the Lease, the plaintiffs had exclusive possession of the back office, and that Post & Ryerson, in fact, at no time had, or were able to obtain any use of it.

Elisha D. Hurlbut, testified that, "*the Hurlbuts* had exclusive possession of the back room"—

R. H. Hoadley, that, "the back office was used by Hurlbut & Co. exclusively,"—

"The plaintiffs' counsel objected to evidence tending to show that, the plaintiffs were at all times from and after the execution of said lease, in the exclusive possession of said back office, and wholly excluded therefrom the said firm of Post & Ryerson, prior to the first of January, and said Post & Dunning at all times thereafter, up to the first of May, when said firm of Post, Smith & Co. removed to said No. 85, upon the ground that such evidence is inadmissible under *the pleadings*. The Court in accordance with the previous ruling and consent, allowed the pleadings to be amended and *received the evidence*, and plaintiffs' counsel excepted"—

"I heard Mr. Dunning say, the members of the firm of Post & Ryerson had a right to the back office"—(*R. H. Hoadley's testimony*.)

B. Dunning, who was objected to as incompetent, and admitted as a witness against the objection and exception of the plaintiffs, testified that, "the back office was occupied by the Hurlbuts;

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we, (Post & Ryerson), wanted more room; the reason we asked for the back room. I went in there with *Capt. Post*, and applied for room in that back office."

The plaintiffs excepted to the admission of this evidence.

"I went in with *Capt. Post* into the back office; he told them he wanted to put a desk in that office; Mr. J. D. Hurlbut objected to it; *Capt. Post* urged it; He wanted more desk room—objections were made in different ways; *Capt. Post* wanted to move the sofa so as to put a desk there. Mr. Hurlbut objected to it, and would not consent. Mr. Hurlbut said they wanted all of it; There was room for more desks: *Capt. Post could not get possession.*"

"The firm of Hurlbut & Co., had always occupied the back office, as a private office."

Russel H. Post, the defendant testified that, "Hurlbut & Co., had the exclusive use of the back room, except that we went in, occasionally, to speak to them about business—*soon after* the co-partnership of Post & Ryerson was formed, we applied to Hurlbut & Co. for the back office, *and tried to get possession of it*, to put in a desk there, and we told them, that by the contract they were entitled only to the use of two desks—this was *soon after we hired*. They said they wanted the exclusive use of that office, and *refused to let us have it*. They would not consent, and we did *not get possession*."

"The reason we did not pay the rent for the last quarter, was because we owed them none. We could not consistently occupy the office. Had no proper use of the office with them, with Layton and Ryerson carrying on an opposition on the same floor, and keeping the back office and so much of the front. Under such circumstances, the office was of no value to us, but we remained there until May."

John H. Ryerson, testified that "Hurlbut & Co. occupied the rear office. There were two desks at the time. * * I rather think I made objection about the desk room in the back office. I told Hurlbut we thought we ought to have desk room in the back office to transact private business, with Hattrick Hurlbut. There were two desks and the sofa. One or the other was generally vacant, and there was no necessity for another. I think *Capt. Post* went in and had some high words with Hurlbut, but cannot say what it was about."

"I never recollect, but once, of Capt. Post having high words in the back office. I never went but once, to my knowledge, to the back office, to see about the desk-room."

This is the whole evidence relating to the question of eviction, or failure to put Post and Ryerson in possession of the whole premises leased to them.

It is to my mind quite clear that there was no pretence of an entry by the plaintiffs on the demised premises, and of an expulsion, by them, of the defendants from any part thereof.

The great effort was, to prove that the plaintiffs wrongfully kept exclusive possession of a part, from the date of the lease, and continued to withhold it until the 1st of May following.

The charge of the Judge, and the question submitted by him, harmonize with this view.

He charged, "that if the plaintiffs withheld from the defendants a portion of the premises, beyond the use of the two desks mentioned in the agreement, without the consent of the defendants, and against their will, from February 1, 1855, to May 1, 1855, such withholding entitled the defendants to a verdict.

"To which plaintiffs' counsel excepted."

The second question submitted was—"Did the plaintiffs withhold from the defendants a portion of the premises, (beyond the use of the two desks mentioned in the agreement), without the consent of the defendants and against their will? If yea, did that withholding continue from 1st of February, 1855, down to the 1st of May, 1855?"

Answer—"Yes."

The defence set up in the answer was, that "the plaintiffs wrongfully entered upon the said demised premises, and evicted the said defendants and the said Dunning from a part thereof, to wit, on or about the 1st of September, 1854, which eviction was continued during the whole residue of said term."

Hence the plaintiffs objected to evidence that, they had at all times had exclusive possession of the back office from the time of making the lease, as inadmissible under the pleadings. But the judge ordered the answer amended so as to admit, and thereupon received such evidence.

It seems to me, therefore, quite clear that all that the defendants tried to prove, and all that the jury have found, is that the

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defendants never had full possession of all they hired. It is not a case, therefore, of an entry by the lessees into possession, and a subsequent expulsion of them by their lessors from a part, either by force, or by acts recognized in law as of equivalent effect.

I find no decision to the effect, that when the lessees never obtained possession of all they hired, but entered upon and enjoyed a part during the term, that they are not liable to pay anything for the part they actually enjoyed.

The contrary was held in *Etheridge v. Osborn*, 12 Wend. 529.

The same rule is asserted in *Lawrence v. French*, 25 Wend. 443-447. The observations of the Court in the case last cited are open to the objection, that that question was not before the Court for adjudication.

In *Christopher v. Austin*, 1 Kern. 218, the Court say, that "where the tenant enters, but is prevented from obtaining the whole of the premises, by a person holding a part under a prior lease from the landlord, it has been placed upon the same footing as an eviction by title paramount, and the landlord has been permitted to recover for use and occupation, on a *quantum meruit*," and cite *Lawrence v. French*, 25 Wend. 443; *Ludwell v. Newman*, 6 T. R. 458; and *Tomlinson v. Day*, 2d Brod. & Bing. 680.

The facts of this case are peculiar. By the lease, the lessors reserved the use of two desks for their private business. The acts of the parties show an understanding by all, that the lessors were to have the two desks, which were in a small room by themselves, and which room had always been used as a private office. The lessors were also serving the lessees, for a commission. Under such circumstances, if nothing more occurred than a demand by the lessees of the right or permission to put a desk in the back office, and that was refused by the lessors, and after that the whole rent was paid without complaint or objection, and Post did not demand any such permission after he and Ryerson had dissolved, the whole ought to be regarded either as an acquiescence by the lessees in the propriety of the refusal by the lessors to consent to have a desk placed in that room, or as presenting a case in which possession of every part of the demised premises was never given to the lessees.

The view, most unfavorable to the plaintiffs, which can be

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taken of this case, upon the evidence, the charge of the judge, and the fact specially found by the jury, is, that the defendants never had possession of all they hired.

If they did not, but took and occupied a part, without insisting that they must have the whole, or they would pay nothing, they are liable to pay, upon the principle of a *quantum meruit*, for that which they have actually enjoyed.

I think, therefore, that the jury were erroneously instructed as to the legal effect of the fact, which they found in answer to the question secondly submitted.

The fact that, the plaintiffs, after the dissolution of Post & Ryerson, rendered no services for either, is no bar to a recovery in this action.

Post & Ryerson dissolved on the 6th of January, 1856. They dissolved on the evident understanding that, each was thereafter to prosecute a rival business on the premises, until the first of May thereafter, for his own benefit. They agreed what part of the demised premises each one should occupy, as his own, during that period.

Post formed a partnership with Smith & Dunning, and Ryerson with Laytin & P. H. Hurlbut.

After the dissolution of Post & Ryerson, the plaintiffs could render no services to that firm, nor could they have the responsibility of that firm for any services they might render to either Post or Ryerson.

It being impossible to render services for them, they were not obliged to remain unemployed. And, Post & Ryerson having dissolved, in order each to prosecute the same business on his own account, and each one forming a new firm for the purpose of carrying on such business, and on the same premises, the fact that *one of the plaintiffs* became a partner of Ryerson, and that such firm was advertised at the time it was formed, no objection being made to it by Post, is quite conclusive to show that, neither Post nor Ryerson considered that either of them had any claim upon the future services of the plaintiffs, or that either of them should abstain from serving either Post or Ryerson, under such arrangements as either of the latter might make with them.

Post & Ryerson are bound by their covenant to pay the stipulated rent. They have, in fact, had the enjoyment of the pre-

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mises up to the first of January 1855 jointly, and thence to the first of May, 1855, of such separate parts in severalty, as conformed to arrangements made solely by themselves.

By the agreement of dissolution between Post & Ryerson, Ryerson was to have exclusive possession of the whole of the demised premises from and after the first of May 1855, or as soon thereafter as Post could get possession of 85 South street.

As the case now stands, it does not appear that, either of the plaintiffs made any agreement with either Post or Ryerson, which affected the duration of the lease, or the claims of the plaintiffs under it. The failure to render services to Post & Ryerson, after they dissolved, does not affect the plaintiffs' right to recover.

On the evidence given, it cannot properly be said that, Post established a cause of action in his favor against the plaintiffs.

And if he had, it is not such a matter as falls within the definition of a counterclaim.

In a suit against two, as partners, a several claim, in favor of one defendant only, cannot be enforced as a counterclaim. The separate judgment in favor of the defendant Post is erroneous.

If the plaintiffs, on another trial, on their pleadings as they may be amended, or on the facts that may be proved, shall be reduced to the necessity of recovering the fair worth of the part actually occupied by Post, and to elect whether they will proceed against him alone, or Ryerson alone, it may be quite proper, in order to ascertain what would be a just compensation for the part occupied by either, to admit proof of the nature of that occupation, and of its value as it was in fact enjoyed, as compared with such enjoyment as the terms of the lease contracted to give. Whatever it may be worth, the plaintiffs are entitled to recover, unless more shall be proved on another trial than appears on the case before us.

The judgment must be reversed, the verdict set aside, and a new trial granted, with costs, to abide the event.

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APPELLANTS.

When, by a written agreement, the parties to it "bind themselves" to perform it, and do not by its terms nor by implication bind any other person, they are personally liable to do or cause to be done, and to pay what they stipulate shall be done and paid, although they are in truth acting on the behalf or for the benefit of others: If in such an agreement they designate themselves as a committee of management, such designation will be regarded as a *descriptio personarum*.

When, by such an agreement, one of two parties promises to pay money, the natural construction is, that the other party is to receive it, unless the agreement otherwise provides. When, by the agreement, the parties stipulate that a sum named shall be paid in weekly instalments, not saying by whom they shall be paid, and that "a further sum" shall be paid by the parties of the second part, and especially when the consideration of the whole contract moving from the other party is to be delivered to and received by said parties of the second part, the true construction is that, the last named parties personally undertake to pay such instalments as well as the "further sum." And the party of the first part is the person to receive all of such payments, when the agreement neither specifies any other person as the one to whom either of such payments is to be made, nor fairly imports that some other person is to receive them.

A stipulation in such an agreement that, "a further sum of five thousand dollars, as an indemnity to Isaac Jacobsohn, is to be paid in two notes of equal amounts, at six and eight months, by the parties of the second part," imports, for the same reasons that, the party of the first part is the person entitled to receive the notes.

Such agreement declaring that, the party of the first part is "acting in behalf of Isaac Jacobsohn & others, interested in the contracts and engagements of sundry artists recently introduced into this country through the medium of Messrs. Ullman and Strakosch," and by it, the party of the first part stipulating and obligating himself, "that, the artists above named are to be transferred and the contracts assigned to the parties of the second part for the term of two months," the whole scope and obvious meaning of such agreement indicate that, the plaintiff (whether with or without authority) assumed to act on the behalf of Jacobsohn & others not named, and to bind himself personally to accomplish certain results beneficial to the parties of the second part, in consideration of their agreement to pay to him for the benefit of those for whom he acted the money and notes stipulated for. In this aspect of the agreement, he is "a trustee of an express trust," as defined by § 118, of the code, and may sue in his own name, without joining with him those for whose immediate benefit the action is prosecuted. There is, therefore, no defect of parties, by reason of not making them parties to the action.

If, under such an agreement, a delivery of the two notes to Jacobsohn would satisfy it *quoad hoc*, it is matter to be pleaded by way of defence, and the complaint need

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not aver that they have not been so delivered, in addition to an allegation that the plaintiff, (the party of the first part) has duly demanded them, and that the parties of the second part refused to deliver them.

It is not essential to a sufficient complaint, on such an agreement, that the plaintiff should allege that he had authority to make such a contract. The personal obligations which, by it, he assumes, constitute a sufficient consideration to uphold it. An averment, in a complaint on such an agreement that, "he, (the party of the first part), and those on whose behalf the said agreement was made and entered into by him, have fully and faithfully performed and fulfilled all, and singular the covenants, and agreements, in the said agreement contained, on the part of the said plaintiff and those on whose behalf the said agreement was made and entered into by him as aforesaid," is, under § 162 of the code, a sufficient allegation of the performance of the conditions, precedent to his right to demand the stipulated payments.

The fair meaning of that section is, that it may be stated generally that, the person or persons, by whom the conditions were to be performed, have duly performed, &c. But the plaintiff being a party to the suit and to the contract, an averment that he has fully and faithfully performed, &c., is an averment that every thing was done which he was bound to do or cause to be done.

The clause, by which the parties agreed "to execute a legal instrument, in due form of law," &c., &c., cannot be so construed as to make the agreement actually signed merely mean that, by it the parties incurred no obligation except to execute such further instrument; as all the rights and obligations of the parties were settled and defined by the one they did execute. Although the complaint designates distinct parts of it as further causes of action, such designation may be disregarded, when it appears on the face of the complaint itself, that in truth they are only distinct and several breaches of the agreement copied into the complaint. Therefore, a demurrer cannot be sustained to any one of them, as not stating facts sufficient to constitute a separate and distinct cause of action.

The making of the agreement and performance thereof by the plaintiff being once stated, the several allegations, of the breaches thereof by the defendant, may be regarded as distinct grounds of recovery rather than separate and distinct causes of action, and these breaches may properly be stated without repeating, before each breach, the averment of such making and performance by the plaintiff.

The order, overruling a demurrer to the complaint, affirmed with costs.

(Before OAKLEY, Ch. J., and DUER, BOSWORTH, HOFFMAN, SLOSSON, and WOODRUFF, J.J.)

Heard, March 21st. Decided, April 11th, 1857.

THIS action comes before the court, at general term, on an appeal by the defendants from an order, made by Mr. Justice Bosworth on the 26th of April 1856, over-ruling, in part, their demurrer to the plaintiff's complaint. The complaint and demurrer, excluding the title of the action, and the fourth cause of action, are as follows:

"David Rowland, plaintiff in this action, by Lee & Smidt; his attorneys, in this his amended complaint, complains of James Phalen and Henry A. Coit; defendants, and says that, prior to the

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5th day of May, A.D. one thousand eight hundred and fifty-five, he was acting on behalf of Isaac Jacobsohn and others, who were interested in the contracts and engagements of sundry artists referred to in the agreement hereinafter set forth, and that certain written contracts and engagements existed with them by which they were bound to perform at Niblo's Theatre, or Opera House, in New York and elsewhere, which the defendants, being then the Committee of Management of the Italian Opera at the Academy of Music in said city, well knew, and that they were desirous of obtaining the services of such artists as performers at said Academy, and that for that purpose the said plaintiff and defendants, having made an agreement to effectuate that object, on the said 5th day of May, A. D. one thousand eight hundred and fifty-five, at the city of New York, reduced the same to writing, and then and there entered into a certain agreement in the words and figures following, viz. :—

"Memorandum of agreement made 5th day of May, 1855, between David Rowland on the one part, acting in behalf of Isaac Jacobsohn and others, interested in the contracts and engagements of sundry artists recently introduced into this country through the medium of Messrs. Ullman and Strakosch; and James Phalen and Henry A. Coit, acting as a Committee of Management of the Italian Opera in the Academy of Music, do hereby stipulate and agree as follows, viz. :—That the following sums are to be paid at the rate of two thousand dollars per week, commencing from the 7th of May, on the Saturday of each week, viz. :—Advances made by the parties of the first part to Madame De La Grange, Signors Murati, Morelli and Marini, amounting in the aggregate to \$12,100 00
Back rent to Niblo's 3,000 00
Travelling expenses 1,650 00

\$16,750 00

The excess of \$750 to be paid, say on the last week.

A further sum of five thousand dollars, as an indemnity to Isaac Jacobsohn, is to be paid in two notes of equal amounts, at six and eight months, by the parties of the second part, that the balance of the rent agreed to be paid to Mr. Niblo, say \$2,250, is to be assumed by them.

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Now, in consideration of the preceding articles of agreement, the undersigned, parties of the first and second parts, do hereby respectively stipulate and obligate themselves that the artists above named are to be transferred and the contracts assigned to the parties of the second part for the term of two months, commencing from the 1st day of May instant. Furthermore, the parties of the one and the other part do hereby obligate themselves to execute a legal instrument, in due form of law, binding themselves each to the other to carry out and fulfill to the fullest extent the purpose and intent of the object of this agreement.

ADDENDUM.

In consideration of certain sums expended by the party of the first part, for printing, advertising and salaries to chorus and orchestra for the current week, the bills of which are to be rendered by Mr. B. Ullman, the party of the second part, agree to reimburse him therefor.

Witness our hands, NEW YORK,
May 5, 1855,

DAVID ROWLAND,
JAMES PHALEN,
HENRY A. COIT."

Witness—HENRY WIKOFF.

And the plaintiff further says, that he and those on whose behalf the said agreement was made and entered into by him, have fully and faithfully performed and fulfilled all and singular the covenants and agreements, in the said agreement contained, on the part of the said plaintiff and those on whose behalf the said agreement was made and entered into by him as aforesaid, but that the said defendants have never executed or offered to execute any other legal or other instrument, in due form of law or otherwise, to carry out or fulfill in any way the purpose and intent of the said agreement.

And plaintiff further says, that on the 12th day of May, A.D. one thousand eight hundred and fifty-five, the sum of two thousand dollars became due from the said defendants to the said plaintiff, parcel of the sum of sixteen thousand seven hundred and fifty dollars, in the said agreement mentioned; and the said defendants, although requested so to do, have not paid the same or any part of it.

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SECOND.—And for a further cause of action, plaintiff says that on the 19th day of May, A. D. one thousand eight hundred and fifty-five, the further sum of two thousand dollars became due from the said defendants to the said plaintiff, other parcel of the sum of sixteen thousand seven hundred and fifty dollars, in the said agreement mentioned, and the said defendants, notwithstanding their said agreement, have not paid the same, or any part of it.

THIRD.—And for a further cause of action, this plaintiff further says, that on the said twelfth day of May, the two promissory notes for the sum of twenty-five hundred dollars each, mentioned and described in the above agreement, and therein agreed to be given by the said defendants, were duly demanded by the plaintiff under the said agreement of the said defendants, and they refused to deliver the same.

Wherefore the plaintiff demands judgment against the defendants for the sum of fifteen thousand dollars, with interest thereon, from the 26th day of May, A. D. one thousand eight hundred and fifty-five, besides the costs of this action."

"The defendants above named, by *Benjamin Galbraith*, their attorney, say:—

FIRST.—As to the first division of the complaint, and as to the supposed cause of action in the complaint first alleged, that they demur thereto because it appears on the face of the complaint that the said first division of said complaint does not state facts sufficient to constitute a cause of action.

SECONDLY.—As to the second division of the complaint, and as to the supposed cause of action in the complaint secondly alleged, that they demur thereto because it appears on the face of the complaint that the said second division of said complaint does not state facts sufficient to constitute a cause of action.

THIRDLY.—As to the third division of the complaint, and as to the supposed cause of action in the complaint thirdly alleged, that they demur thereto, because it appears on the face of the complaint that the said third division of said complaint does not state facts sufficient to constitute a cause of action.

FOURTHLY.—As to each and all of the alleged causes of action stated in the complaint, that they demur thereto because it appears upon the face of the complaint that there is a defect of parties,

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and that Isaac Jacobsohn, and others interested in the contracts stated in the complaint, and Messrs. Ullman and Strakosch and Madame De La Grange, and Signors Murati, Morelli and Marini, and William Niblo, are necessary parties, plaintiff or defendant.

FIFTHLY.—As to each and all of the alleged causes of action stated in the complaint, that they demur thereto because it appears upon the face of the complaint that several causes of action have been improperly united therein."

The directory part of the order appealed from, reads thus:

"It is ordered and adjudged that judgment be entered for the defendants upon the demurrer to the fourth cause of action set forth in the complaint, with leave to the plaintiff to amend the complaint within twenty days, without costs, unless the plaintiff shall elect to strike out the said fourth cause of action within twenty days, and in case he does so elect and give notice of such election to the attorney for the defendants, then it is ordered and adjudged that judgment be entered for the plaintiff upon all the demurrers to the complaint, with leave to the defendants to answer the complaint within twenty days after the service of the notice of such election, without costs."

On the 10th of May 1856, the plaintiff served notice of his election to strike from the complaint, the 4th cause of action stated therein.

On the 5th of June 1856, the defendants served notice that they appealed from the order of the 26th of April, 1856.

D. D. Field, & B. Galbraith, for the Appellants, made and argued the following points.

I. Where a complaint contains several alleged causes of action, each statement of a cause of action must be complete in itself. In this case, each claim is not complete in itself.

II. The first claim or division of the complaint does not state facts sufficient to constitute a cause of action.

a. The contract set out shows an agreement by the defendants "as a committee of management," and not individually, and there is no allegation that they made the contract without authority.

Stanton v. Camp, 4 Barb. 274; *Calvin v. Holbrook*, 2 Coms.

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129; *Downman v. Williams*, 7 Q. B. 103; *Higgins v. Hopkins*, 18 Law, J. 118 Ex.; *Russell v. Reece*, 2 Car. and Kir. 669; *Babcock v. Beeman*, 1 Kernan, 200.

b. The contract set out does not in terms or by necessary implication point out who is to make the payment of \$2,000 per week, nor to whom the payments are to be made, and there is no allegation to explain this ambiguity.

c. The contract set out does not show any consideration moving to the defendants for the making of it, at least no consideration moving from the plaintiff, and it is void for that reason.

It does not appear that the plaintiff had any authority to act for the parties interested in the contract or to transfer the artists or to assign the contracts, or that he would do it or cause it to be done. The obligation to transfer the artists and assign the contracts is a joint one of the plaintiff and defendants.

d. If the said contract can be construed to mean that the defendants were to pay the \$2,000 per week, and the plaintiff was to transfer the artists and assign the contract, the transfer of the artists and assignment of the contracts was a condition precedent to the payment of the weekly sum of \$2,000.

Grant v. Johnson, 1 Selden, 247.

e. The performance of the condition precedent is not sufficiently alleged. The allegation does not follow the code (s. 162.) The code requires the word "*duly*," and that word should be used.

Jacobs v. McDonald, 8 Mo. R. 565.

The averment of performance is not sufficient, independently of the code.

Thomas v. Van-Ness, 4 Wend. 558.

f. It is not alleged that the defendants had notice of the performance by the plaintiff of the condition on his part.

g. It is not alleged that the \$2,000 became due in respect to the said contract.

III. The second claim or division of the complaint does not state facts sufficient to constitute a cause of action.

a. It does not, by reference or otherwise, incorporate the preceding allegations of the complaint, or in anywise allege more than is therein alleged, and the allegations, in that division of the complaint, show no duty and no breach on the part of the defendants.

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b. If the instalment became due before the commencement of the action, it should have been included in the first claim or division; the failure to pay the second instalment was a part of the plaintiff's cause of action, and not a separate cause of action.

IV. The third claim or division of the complaint does not state facts sufficient to constitute a cause of action.

a. The agreement, if considered as part of that claim, and if valid and binding, is an agreement to give notes to Jacobsohn and not to the plaintiff.

b. The failure to deliver the notes would not give a cause of action for the amount of them, but only a cause of action for the damages sustained by the breach.

c. The delivery of the notes was at least conditional on the plaintiff performing his condition precedent, and it is not alleged that the demand of the notes was after performance of said condition precedent.

V. The agreement set forth is too vague and uncertain to be enforced.

Chit. Con. 72.

VI. The agreement set forth in the complaint contemplated the execution by the parties of a formal instrument defining their rights and obligations respectively. The defendants incurred no liability, *except to execute such an instrument, and the only cause of action is upon a refusal to do so.* No request or refusal is averred and therefore no cause of action is made out. This objection goes to all the causes of action stated in the complaint. 9 J. R. 336.

VII. Jacobsohn and his associates, Ullman and Strakosch, Lagrange, Murati, Morelli and Marini, are necessary parties, for without their presence a complete determination of the controversy cannot be made. In no other way can the defendants be protected from other suits by these persons upon the same claims as are set up in this complaint.

VIII. Not only are other persons necessary parties, but if they were brought in, the complaint would contain several incompatible causes of action. If the first two claims concern the plaintiff alone, the third concerns him and Jacobsohn, and the fourth concerns Lagrange and the other artists.

Wm. Curtis Noyes, for Resp't.

I.—The first division of the complaint states facts sufficient to constitute a cause of action: 1. It sets forth an agreement entered into between the parties to the suit by which each is personally bound, as for himself, and not for others. *Taft v. Brewster*, 9 J. R. 335; *Moss v. Livingston*, 4 Comst. 208. That agreement is a valid and binding one, upon the parties to the same, they *having personally bound themselves*. 2. It alleges the faithful performance of that agreement on the part of the plaintiff, which is enough under the Code; as all the facts essential to a complete performance are embraced in the general averments, by force of the statute, even to a tender of written assignments and transfers, if that be necessary. Code, § 162. *Van Santvoord's Pr.*, 2d ed., 235. 3. It alleges a breach of that agreement on the part of the defendants in not paying the sums required to be paid, and the demurrer admits both the performance of the conditions by the plaintiff, and the breach by the defendants. 4. It makes no difference in this case, that a further agreement was to be executed, as an action lies for not performing that part of this agreement, and this action embraces that cause of complaint. *Cowley v. Watts*, 17 Jurist, 172. S. C., 17 Law & Eq. 147.

II.—The first point will apply equally well to the second, third, fourth and fifth grounds of the demurrer, and to the third cause of action, the defendants having agreed to give the notes, were bound to perform their agreement, having positively assumed so to do in their own name.

III.—There is no defect of parties. 1. It was not necessary for the plaintiff to join others with him as plaintiffs, as he is the "trustee of an express trust," being a person in whose name the contract in the complaint set forth is made, for the benefit of others. Code of Procedure, § 113. 2. It would not have been proper to join other parties with the defendants; because,

a. It does not appear, on the complaint that, the plaintiff has any cause of action against any of the parties named in fourth demurrer.

b. It does not appear that, the parties named have any rights

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adverse to the plaintiff, or that they are in any way necessary parties.

There should be judgment for the plaintiff affirming the decision on the demurrer, with costs.

BY THE COURT. WOODRUFF, J.—It is unnecessary to enlarge upon the proposition that individuals may, if they think proper, bind themselves personally to the performance of any engagement, although they are in truth acting on the behalf or for the benefit of others—and when, on the face of an instrument, they profess, in terms, to bind themselves, and neither, in terms nor by implication bind any other person, or if in form they bind themselves, then, whether any other is or is not also bound, they are liable. In this complaint and in the agreement set forth, the defendants are described as a Committee of Management of the Italian Opera. But the language of the agreement is, they “bind themselves.” What the office or duty of a committee of management may be we cannot say—it is here, at most, a *descriptio personarum*. It does not import any authority to contract for any other person, or persons, or corporation—it does not imply that any other persons will be bound by their acts but themselves, nor does it purport to bind any other person, or persons, or corporation to do or perform anything.

I cannot hesitate in saying that, if the agreement set forth was binding upon the defendants in any sense, it was a contract binding them personally to its performance.

In considering whether the agreement, in question, sufficiently indicates by whom and to whom the payments are to be made, it is proper to observe that by the rule which requires certainty in a contract, courts are not called upon to exercise great ingenuity, and become astute to find or suggest a doubt of its meaning. If, when read in connection with the whole subject matter to which it relates, and according to the ordinary and natural acceptance of the terms employed, the intention is clear, that intention is to prevail; and this is true, even where the language is ambiguous, if the intention be obvious.

Again, in an agreement, between two, stipulating for the payment of money, if it plainly appears which of the two is to pay, it follows not merely as the natural, but as the sound legal con-

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struction of the instrument, that the other is to receive the payment, unless the agreement itself provides that the payment shall be made to some other person; *e. g.*, if in a contract, between A. and B., it is agreed, that A. shall pay one thousand dollars, and that B. shall deliver one thousand bushels of wheat, no one would hesitate to say, and no court would hesitate to adjudge, that it was the manifest intention, that A. should pay the money to B., and that B. should deliver the wheat to A.

Does this contract show by whom the respective instalments of \$2,000 a week are to be paid? It does, as I think, very plainly.

When first named, the language is, "that the following sums *are to be paid* at the rate of \$2,000 per week," &c. But when we look a little further, in the agreement, we find that a *further* sum is to be paid by the *parties* of the *second part*. How are they to pay a *further* sum unless they also are to pay the first?

Not only this, but, in the succeeding clause, we find that, in *consideration* of these stipulations, the artists are to be transferred, and certain contracts assigned to the parties of the second part; that is, according to the obvious meaning, the parties of the second part are to receive the transfers and assignments, in consideration of the stipulation for the payments, and these are of course to be made by them, else the stipulation for the payments could constitute no consideration for what they are to receive. Words might be multiplied upon this point, but it seems to me that no intelligent and unbiassed mind can read the agreement without declaring, without hesitation that, the intention is plain that, the parties of the second part (the defendants) are to pay the \$2,000 per week, as they, in express terms, agree that they will the *further* sum also mentioned.

Nor does it appear to me less certain *to whom* the payments are to be made. I have already said that if it be clearly ascertained *by which*, of the parties, the payment is to be made, it follows that the payment is to be made *to* the other, unless the agreement points out some other person, who is to receive the payment.

In addition to this, the covenant, made in consideration of the agreement to pay, binds the party of the first part, (the plaintiff), to a transfer and assignment of the contract to the parties of the second part. It is the reasonable and natural inference that the payments, in consideration of which he enters into that engage-

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ment, are to be made to him. And it does not appear, either in terms, nor by any obvious implication, that the payments in question are to be made to any other person. While on the other hand, when a payment, to a third person, was contemplated, totally different language was used; thus "the balance of the rent agreed to be paid to Mr. Niblo, say \$2,250, is to be assumed by them."

It was suggested, on the argument of the appeal, that because in making up the aggregate, which was to be paid by the instalments stipulated, the sums are spoken of as advances made by the *parties* of the first part,—which should be taken to mean not only the plaintiff, but those on whose behalf he acted,—that therefore it is to be implied that the payments were to be made to the particular persons who made the advances—and as to the back rent, that it should be paid to Niblo, &c.

In the first place, this construction is not at all necessary to make the agreement intelligible, nor the necessary import of the language. If the plaintiff, acting as trustee for the other persons, bound himself to the performance of acts, affecting the interest of those for whom he was trustee, and especially if, for the performance of his agreement, he would find it necessary to have their co-operation, it was natural that he should require, that the means should be placed in his hands, which would not only enable him to protect their interest, but which he could control, so far at least, that he might make it available, in procuring their co-operation—making himself personally liable, he might naturally provide, that he should control the consideration, so far, that if his performance failed for the want of such co-operation, he would not both lose the consideration and remain liable on his agreement.

But what seems to me decisive upon this question is, that the sums agreed to be paid were *instalments* of one aggregate sum; if the money was to be paid to several, and the amounts each was to receive were different, they would have been specified. This paying by instalments cannot be reconciled with the construction contended for. There is no one of the three items making up the \$16,750, to which the first, or the second, or any other of the instalments was applicable. To say that these instalments were not to be paid to the plaintiff, is to place the

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defendants in a situation, in which they could not pay if they would, and so to make the agreement void. A construction tending to this should not be adopted, if any other construction is rational, and tends to accomplish the intention of the parties. Besides, it seems to me quite obvious, that the description of the items, making up the aggregate of \$16,750, was used as matter of mere description, and not, at all, as a designation of persons to whom the defendants were to make the payments.

Many of these suggestions, if not all, apply to the stipulation that "a *further* sum" of \$5,000, as an indemnity to Isaac Jacobsohn, is to be paid in two notes, of equal amounts, at six and eight months, by the parties of the second part. The nature and object of the indemnity, mentioned as the purpose which these notes were to serve, is not stated, and what damages have been sustained, by the non-delivery of the notes, does not perhaps appear; but it seems to me far from doubtful that the parties intended that the notes should be given to the plaintiff. The language does not import that Jacobsohn should receive them; his indemnity might never require that he should even have the benefit of them. The same reasons, that made it proper that the plaintiff should receive the other payments, would also suggest that he should receive the notes. He gave the consideration, i.e. he bound himself that the consideration should come to the defendants, and the words used do not indicate that their performance was not to be to him directly.

It is no unnatural reading of this part of the agreement that the plaintiff was made the recipient or depositary of the two notes, the purpose and object of which notes was explained to be Jacobsohn's indemnity; and it may be said that the plaintiff was to see to the application of the notes, or the proceeds thereof, to that object. The reference to Jacobsohn seems not for the purpose of designating to whom the notes should be given, but the reason why they were given, and perhaps the purpose to which the plaintiff, as trustee, should apply them. The whole scope, and to my mind, the obvious meaning of the agreement, indicates that the plaintiff (whether with or without authority) assumed to act on the behalf of Jacobsohn and others not named, and to bind himself personally to accomplish certain results beneficial to the defendants, in consideration of their agreement

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to pay to him, for the benefit of those for whom he acted, the money and notes stipulated for. That he acted, in this, as the trustee for those who were beneficially interested in the matters to which the agreement relates.

In this aspect of the agreement the plaintiff answers perfectly the definition of a *trustee of an express trust* in section 118 of the code of procedure, viz: "a person with whom or *in whose name* a contract is made for the benefit of another." And this seems to me to define his position in reference to all the payments stipulated for in this agreement, and to dispose of the objection that, other parties (for whose benefit the agreement was made) should have been joined in the action, either as plaintiffs or defendants.

Surely if the agreement in relation to the notes, instead of reading, "as an indemnity to Isaac Jacobsohn," had read, "for the benefit of Isaac Jacobsohn," the case would not be less strong for the defendants, and yet that would be in the very terms of the section of the code referred to; and in such case, the code provides that the trustee may sue in his own name, without joining with him the person for whose benefit the action is prosecuted.

It is suggested that, a payment or delivery of the notes directly to Jacobsohn would satisfy the agreement, and that the complaint does not aver that such payment has not been made. This proceeds upon the assumption that on an agreement to pay to one for the benefit of another, payment directly to such other is a performance of the agreement, and this is not, in my apprehension, true. At *law* it is no performance at all; in equity such an agreement may be enforced by the person beneficially interested, but he could not sue upon the agreement, at law, unless he showed that, the relations between him and the party in whose name the contract was made were such that, it was, in law, an agreement with himself. This latter class of cases are numerous, (see *Union Ind. R. Co. v. Tomlinson*, 1 E. D. Smith, 864), but it is unnecessary to dwell upon them, because there are also many cases in which, although it be true that he, for whose benefit the contract is made, may sue at law upon it, so also may he, in whose name it is made.

And where in fact a contract is made with a trustee, as such, he could always sue thereon in his own name.

Besides if the suggestion that a delivery of the notes might be made to Jacobsohn be conceded, it amounts only to this, that the defendants may defend the action by showing that the notes have been so delivered; it is matter to be set up affirmatively by the defendant, which the plaintiff is not bound to anticipate and deny.

In regard to the alleged want of consideration, moving to the defendants, arising from the failure of the plaintiff to show any authority to contract; Much that has already been suggested bears upon this ground of demurrer and tends to show that it is without just foundation. It must suffice to add that, on the face of the agreement, the plaintiff bound himself that certain artists should be transferred and certain contracts assigned. This agreement is alone consideration enough to support the counter-agreement by the defendants, unless the agreement on his part was illegal or impossible of performance. Here is no pretence that the things which the plaintiff agreed should be done were illegal. An agreement cannot be said to be impossible because for its performance the concurrence of a person or persons not parties to the agreement is necessary. In such case, the agreement imports that the party binding himself will cause it to be done; it assumes the employment only of legal and proper means for its performance; that those means will be used by the agreeing party, and he guarantees that those means shall be effectual; if not, he is liable for a breach of the agreement.

A. may covenant that certain land shall be conveyed to B. on a day specified, B. paying to A. a sum of money. Such an agreement is neither illegal nor, in judgment of law, impossible, because at the making of the covenant the land is owned by C. The construction of such an agreement is that, for the consideration agreed to be paid, A. will cause the land to be conveyed to B., and A. takes the hazard of being able to accomplish that result.

So here, the plaintiff agreed that the artists should be transferred and the contracts assigned. He undertook to cause it to be done, and the fact, that the assent or concurrence of the artists or of those who held the contracts, must be procured to enable him to perform, did not make the obligation to perform any less his obligation. He took the hazard of accomplishing all that was

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requisite to the complete performance of what, by the terms of the agreement, was due to the parties of the second part, the defendants.

The views last suggested have an important bearing upon the objection that, performance of all that was due to the defendants was a condition precedent to their obligation to pay, and that such performance is not sufficiently alleged.

The defect in the allegation is claimed to be this, that, it appears that the transfer of the artists and the assignment of the contracts necessarily required that persons other than the plaintiff should perform, and that the plaintiff was bound to state in detail what they did, because the Code, § 162, only warrants a general statement of the performance of conditions precedent which are to be performed by the plaintiff himself.

The language is that "in pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part."

It seems to me the most reasonable construction of this section to say that, "party" here means the person or persons by whom the conditions were to be performed—certainly it does not necessarily mean the plaintiff in the suit; if it did then the assignee of a claim founded on such a contract, could not avail himself of the benefit of the section where the conditions had been performed by the person with whom the contract was made. Nor must it necessarily and invariably be the person who is the party to the contract, for it may often be true that the interest in a contract being assigned to another, he performs all the conditions and is entitled to the payments. We are instructed by the Legislature to construe the allegations in a pleading liberally with a view to substantial justice between the parties, (Code, § 159). And again it is enacted (§ 467) that the rule, that statutes in derogation of the common law, are to be strictly construed, has no application to the code.

Unless, then, we are critical, to a degree which would exclude the operation of this section 162, from large classes of cases which are in all respects within its spirit and general intent, and unless we must adhere to a purely strict and technical interpre-

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tation of its words when no beneficial purpose renders it necessary—unless indeed, we undertake to give to the word, “party” a meaning which it does not necessarily require, in order to restrict the application of the section to as few cases as possible, and leave the inconvenience the section was designed to remedy to exist in as many cases as possible, we must say that the section means that, it may be stated generally that the person or persons by whom the conditions were to be performed, have duly performed, &c.

This construction of the section is not, however, necessary to the maintenance of the averment in question. Here the averment is made by one who is both a party to the suit and a party to the contract; he agreed that the artists should be transferred and the contracts assigned; if any concurrent action of others was requisite to the performance of his engagement, he was to procure that concurrence. He made the agreement that it should be done. When, therefore, he avers that he has fully and faithfully performed all and singular the covenants, &c., on his part, he does aver that every thing was done which he was bound to do or to cause to be done; and he only strengthens this covenant when he adds that those on whose behalf he acted, have also performed. In no aspect can the addition of this statement impair the effect of his averment, though I think it was not necessary.

The claim that, under the agreement set forth in the complaint the defendants assumed no obligation except to execute another more formal instrument, and that there being no averment of a request and refusal no breach is alleged, admits of a twofold answer.

It is not apparent from the tenor of the stipulation, that it contemplated anything more than such further assurance as might be found necessary—not to *define* and *settle* the *rights* of the parties under the agreement then reduced to writing—but to effect the full accomplishment of “the *purpose* and *intent* of the *object* of the agreement”—i. e. the ultimate motive which led to the making of the agreement.

But another answer seems quite sufficient. So far as appears by the contract before us, all the rights and obligations of the parties were defined and settled by what was then written. In

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order to the binding character of the obligations of the parties, no further writing was necessary, and the court will never say that a party shall not recover upon a valid binding contract, merely because the parties, at the time it was written, contemplated making another agreement of the same purport; the making of the latter in such case would be a work of supererogation, wholly immaterial and superfluous as to either of them.

And once more, if any act of this sort was necessary to entitle the plaintiff to claim performance by the defendants, i. e. if in any just sense his execution of such further agreement was a condition precedent to his right to demand the payment, then his averment of the performance of *all* the conditions, covers this condition with the others.

The objection that those parts of the complaint which are denominated further causes of action, are incomplete in themselves and, read separately, show no cause of action, was not strenuously insisted upon, on the argument of the appeal. The points submitted treat them like separate counts in a declaration under our former system of pleading. They are more properly to be regarded as separate breaches of the one agreement set forth in the complaint. In that respect they are like the common practice of alleging several breaches in a single count in the former action of covenant broken.

The pleader here, has chosen to call each a further cause of action; in one sense they are. They are substantive grounds of recovery upon the agreement which is set forth, and to which each in terms refers. It was, perhaps, unnecessary to call them separate causes of action: but at most, that was an immaterial designation of what are very plainly nothing more than alleged several breaches of the one agreement referred to. To require the pleader to repeat the averments, setting forth the making of the agreement, and its performance on the part of the plaintiff, before each statement of a breach, would not only be requiring what was wholly unnecessary before the code, but would be requiring a useless repetition, which the code in terms forbids. § 142.

What has already been said in relation to the right of the plaintiff to sue in his own name, (under § 113,) without joining those for whose benefit the contract is made, and his right to

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require that the payments be made to himself, disposes of the objection that, there is a defect of parties, as well as the suggestion that, causes of action are improperly joined.

The order appealed from should be affirmed with costs.

DUER, J., dissented.

AARON VAN VALKENBURGH v. THE ASTOR MUTUAL
INSURANCE COMPANY.

The insurance, in this case, was upon goods "from New York by steamer or steamers, to Chagres, at and from thence by the usual conveyances across the Isthmus to Panama, and at and from thence by steamer or steamers to San Francisco."

Held by BOSWORTH, J.—That the policy covered three distinct voyages by different conveyances, and that the implied warranty of seaworthiness attached at the commencement of each.

Held contra by HOFFMAN, J.—That although the conveyances were different, the voyage was entire, and that the implied warranty attached only at the commencement of the voyage from New York.

It was found by the Judge, who tried the cause without a jury, that the goods insured were damaged by being saturated with water during their transportation in a flat boat on the Chagres river, that the water entered and came into the boat by reason of its leaking when the goods were put on board, and that such damage was not, nor was any part of it, caused by rain or spray.

Held by the Court.—That it was a necessary conclusion from the facts thus found, that the goods were not damaged by the perils insured against, and consequently the defendants were not answerable for the loss.

Judgment for the defendants affirmed with costs.

(Before BOSWORTH and HOFFMAN, J.J.)

Heard February 12, decided April 11, 1857.

THIS is an appeal by the plaintiff from a judgment, at Special Term, in favor of the defendants.

The action was on a policy of insurance upon goods, at and from New York by steamer or steamers to Chagres, at and thence by the usual conveyances across the Isthmus, at and thence by steamer or steamers to San Francisco. The goods, upon their arrival at San Francisco, were found to be greatly damaged by

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water, and it was for the recovery of this loss, as occasioned by the perils of the sea, that the action was brought.

It was tried, by the consent of the parties, before MR. JUSTICE BOSWORTH, without a jury, in May, 1854. The following are the propositions of fact, found by the Judge upon the pleadings and evidence, and his conclusions of law thereupon :

I. That the said plaintiff was insured by the defendants, upon the goods alleged to have been damaged, under the policy of insurance hereinbefore set forth.

II. That said goods were carried by steamer to Chagres, at and thence by the usual conveyances across the Isthmus, and at and thence by steamer to San Francisco. Said goods, before being put on board of the steamer in which they left New York, having been delivered in New York, by the plaintiff, to the express companies of Adams and Company or Gregory and Company, under the receipts hereinbefore set forth, and under an agreement for the transportation thereof, as therein contained and thereby expressed; that the said express companies received from and were paid by the said plaintiff the whole freight upon the said packages respectively, from New York to San Francisco, and made their own agreements with the said steamship company, for the transportation thereof to San Francisco.

III. That the conveyances by which these goods were carried across the Isthmus were flat boats, owned by the river boatmen; and that the express companies did not own them, nor any of the steamers used in the transportation of the goods, but that they were the usual boats and the usual means of conveyance employed in transporting goods up the said river, which had been shipped at New York, on board of the steamers of the said steamship company, to be carried thence by the aforesaid route to San Francisco, California.

IV. That the defendants knew, at the time of making the several endorsements on the policy, that the goods referred to in these endorsements were to be sent (by the plaintiff) by the express companies by whom they were sent. That the receipts given by the express companies were the usual receipts given by them, and in the form usually given by them to all persons who sent goods by them. That the plaintiff did not communi-

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cate to the defendants anything as to the character of the agreement he had made with the express companies, or that he had made any special agreement with them; and that the defendants had no knowledge, until after the loss happened, (except so far as such usage amounted to knowledge,) what agreement was made between the plaintiff and said express companies. But that there was no intended fraud on the part of the plaintiff, nor any intentional concealment or suppression of such knowledge from the said defendants.

V. That the said goods suffered loss while being carried in a flat boat, up the Chagres river, by being saturated with water while being transported in said flat boat.

That such water entered and came within said flat boat, by reason of the leaking thereof, during such transportation of the said goods. That the aforesaid damage to the said goods was not caused, nor was any part thereof caused, by rain or spray.

VI. That the said loss to the goods amounted to twelve hundred and thirty-seven dollars and twelve cents; that proof of such loss was duly made on the 19th day of March, A. D. 1852; and that if said loss is payable, interest is also payable upon the same, from the 19th day of April, A. D. 1852.

And the said Justice thereupon decided, that his conclusions of law upon the facts so found were, that the defendants were not discharged from their contract, by reason of the terms of the agreements made between the plaintiff and the said express companies hereinbefore set forth.

There being no evidence whatever of the occurrence of any violent storm, or of any extraordinary peril, or of the encountering of any perils which could have caused the leaking of the flat boats on which the goods were damaged, the presumption is, that such flat boats were unseaworthy at the time the said goods were put on board of them.

That the loss sustained by the plaintiff resulted from the unseaworthiness of the flat boats in which the goods were transported on the Chagres river, and not from any of the perils insured against.

That the defendants are entitled to a judgment against the plaintiff for their costs of this action.

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To this finding and decision, exceptions on the part of the plaintiff were duly filed. The receipts, given by the express company, are omitted, as not bearing on the questions decided, on the appeal.

F. B. Cutting for the plaintiff.—On the point, that there was no warranty, express or implied, of the seaworthiness of the flat boats on the Chagres river, cited 24 Eng. L. & Eq. R. 16; 33 *id.* 325; 34 *id.* 266, 278; 4 House of Lords' Cases, 353; 16 Queen's B. R. 161; and other cases. And to show that the defendants were responsible for the loss, even if occasioned by the condition of the flat boat or the misconduct of those who had charge of her, he cited 5 Mees. & Welsb. 415; 8 *id.* 895; 14 *id.* 476; 20 Ohio, 199, and other cases.

W. C. Noyes for the defendant.—To show that, if the goods were not injured by the perils of the sea, but by the leakiness and unseaworthiness of the flat boat on the Chagres, the defendants were not liable, cited 2d Arnould on Ins. 757, 774; 3 Kent's Comm. 300; 1 Phillips on Ins. (2d Ed.) 675-678, 686-688.

April 11th, the Judges delivered their opinion, *seriatim*.

BOSWORTH, J.—The Judge before whom this action was tried, found as facts that, the goods insured were damaged while being carried in a flat boat up the Chagres river, by being saturated with water while being transported in said flat boat.

That such water entered and came within said flat boat, by reason of the leaking thereof, during such transportation of the goods. That such damage was not, nor was any part of it, caused by rain or spray.

The conclusion of the Judge, on these facts, in the absence of all evidence of any violent storm, or of any extraordinary peril, or of the encountering of any perils which could have caused the leaking of the flat boats on which the goods were damaged, was, that such flat boats were unseaworthy at the time the said goods were put on board of them. The latter conclusion is stated as a conclusion of law.

Whether the implied warranty of seaworthiness, with the

usual consequences, attached to these boats, under the policy in question, is, perhaps, a debatable question.

But whether it did or not, I think, the conclusion stated; that they were actually unseaworthy, was one which followed, as a just legal inference, from the special facts on which it was based.

Arnould states the rule thus: "Where a ship becomes so leaky or disabled as to be unable, to proceed on her voyage, soon after sailing on it, and this cannot be ascribed to any violent storm, or extraordinary peril of the seas, the fair and natural presumption is, that it arose from causes existing before her setting out on her voyage, and consequently that she was not seaworthy when she sailed. In such cases, therefore, it is incumbent on the assured to show that, at the time of her departure, she was in fact seaworthy, and that her inability has arisen from causes subsequent to the commencement of the voyage." 1 *Arnould*, 686, and note 1. The cases there cited support, as I think, this proposition.

Perhaps it would have been more appropriate, to have found as a fact, that the boat was unseaworthy, when the goods were put on board of the boat, and also at the time, when the boat commenced its voyage.

But the special facts, on which this conclusion was founded, are stated. They furnished *prima facie* evidence of the truth of the conclusion, and cast on the assured the burthen of proving that the boat was seaworthy at the commencement of its voyage.

Whether the conclusion be found and stated as one of fact, without stating the special facts on which the general and more comprehensive one of unseaworthiness was based, or as is done here, the special facts are stated, and the presumption which, the law draws from them, be found as a conclusion of law, does not seem to be very material.

The water, in the boat, did not come there from rain or spray. The water, as is found to be the fact, came into the boat from its leaking. One of the packages was seen at Galloon on the Chagres River. It was then in the bottom of the boat half covered with water. That boat carried the goods some forty or fifty miles. All of these goods, according to the evidence, must have lain in the water a long time, to have been reduced to the condition, in which they were found to be, on reaching San Francisco.

It is, probably, a fair inference that there was great inattention

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on the part of the boatmen to the condition of the goods, while in their charge, and that but little if any thing was done, in the way of bailing the boat, to obviate the consequences, to the goods, of its leaking.

It would seem that the goods, instead of being damaged by any peril insured against, were damaged through the inattention and negligence of the boatmen, and their failure to perform their duty properly.

Does the rule, that the assured warrants the seaworthiness of the vessel in which his goods are laden, apply to these boats?

At least three separate portions of the voyage, were to be traversed, by as many separate and different mediums of transportation, by water.

FIRST.—“By steamer or steamers to Chagres.”

SECOND.—“At and thence by the usual conveyances across the Isthmus.”—(A part of the transit across the Isthmus, at that time, was performed by taking goods up the Chagres River, in river boats. These were, then, the usual conveyances.)

THIRD.—“And at and thence, by steamer or steamers to San Francisco.”

I think there was an implied warranty of the seaworthiness of each steamer, sailing from New York to Chagres, and carrying the goods in question, at the time she commenced her voyage from the former port. And, that there was the same warranty as to each steamer sailing from the Pacific side of the Isthmus to San Francisco, at the time her voyage was commenced.

The policy by its terms, is, “to attach only to such risks as shall be approved by the company, and endorsed” on it. It is in effect, a distinct insurance for each voyage, each voyage consisting of three separate parts, through each of which the goods were to be carried by a new and distinct medium of transportation.

The endorsements, made on it of the three shipments in question, under dates of Sept. 13th, Sept. 30th, and Nov. 2nd, 1850, specify the names of the steamers on which the goods are to be carried from New York to Chagres, but not those in which they were to be conveyed from the Pacific side of the Isthmus to San Francisco.

If there was no implied seaworthiness of the latter steamers at the time, they commenced their distinct and independent part

of the voyage, there could be none which attached to any of "the usual conveyances across the Isthmus."

But if there was, then on principle it should be equally applicable to the vehicle of conveyance across the Isthmus, unless there is something in the terms of the policy, which forbids such an application of the rule.

But it is unnecessary to determine the question whether the assured warranted the seaworthiness of the steamers, which carried the goods on the Pacific,—The goods were not damaged while on board of such steamers. And determining that, this implied warranty did not attach to them, nor to the flat boats, would not, in my judgment, be decisive of the question before us.

By the terms of the policy, the goods in question, were insured against the enumerated perils, at and from Chagres, across the Isthmus, while being transported "by the usual conveyances."

The stipulation admits, that, the goods "were transported up the Chagres river, and across the Isthmus, by the usual conveyances, i. e., by the usual river boats, and were damaged on such boats."

The Court has found that the boats, employed in carrying the goods in question, "were the usual boats, and the usual means of conveyance employed in carrying goods up the said river, which had been shipped at New York, on board of the steamers of the said Steamship Company, to be carried thence by the aforesaid route to San Francisco, California." Even if it should be conceded that, inasmuch as the goods were sent across the Isthmus by the usual means of conveyance, the plaintiff should not be defeated of his action on the mere ground that the law will imply him to have warranted that the boats were in better condition, than that attributed to them by the fair import of the policy, it does not follow that, on the facts as found, the plaintiff is entitled to recover. It must be borne in mind that the goods were injured, "by being saturated with water while being transported in said flat boats."

"That such water entered and came within said flat boats, by reason of the leaking thereof during such transportation of the goods." And that no part of the damage to the goods was caused by rain or spray.

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That there was "no evidence whatever of the occurrence of any violent storm, or of any extraordinary peril, or of the encountering of any perils which could have caused the leaking of the flat boats," and on this also found as an inference or conclusion of law, that the boats, at the time the goods were put on board of them, were unseaworthy, or, in other words, instead of being staunch and tight, were leaky, and that the goods lay in, and were saturated with water, in consequence of the leaky character of the boats, and that the loss sustained did not result "from any of the perils insured against."

The gravamen of the complaint is, that the goods became and were wet and damaged by sea water, occasioned by the perils of the seas, and the other perils in the said policy mentioned, and thereby insured against, but how otherwise, in particular, the plaintiff, for the want of information, cannot state more particularly." These allegations are put at issue by the answer.

The plaintiff is not entitled to recover by merely proving a loss. He must show the occurrence of a peril insured against, and also give evidence that the loss was caused by it.—*Coles v. Mar. Ins. Co.*, 8 Wash. C. C. 159, 161; *Coffin v. Phoenix Ins. Co.*, 15 Pick. 291; *Donnell v. Columbian Ins. Co.*, 2 Sum. 366-272.

When a loss arises from causes, which it is the duty of the carrier to prevent, or which he might have prevented, by the due exercise of reasonable and ordinary vigilance, the underwriter is discharged from liability.—2 Arnould, 774.

So where the loss is not proximately caused by the perils of the sea, but is directly referable to the negligence or misconduct of the master, or other agents of the assured, not amounting to barratry, the underwriters are not liable.—*Mathews v. the Howard Ins. Co.*, 1 Kern. 9; *Genl. M. Ins. Co. v. Sherwood*, 14 How. U. S. 352; 2 Arnould, 775, § 287.

These boats are about eight feet by twenty, and about a foot deep, and open at the top. Goods on the bottom are visible to the eye, and any one in charge of them, could not, but see the goods standing in the water which came into the boats, in consequence of their leaky condition.

I think it quite clear upon the uncontradicted evidence, and a

just inference from the facts found, that these goods were not damaged by any of the perils insured against, but by the leaky character of the boats, from the consequences of which, no proper efforts were made by the boatmen, to protect the goods. But, on the contrary, the boatmen, although knowing the goods were exposed to injury from standing in the water, left them thus exposed until they became so injured, that the damage, which has been proved, ensued.

We agree in the conclusion that the goods were not damaged by any of the perils insured against.

The judgment should be affirmed.

HOFFMAN, J.—There are three questions arising in this cause.

FIRST.—Whether the defendants are discharged in consequence of the special agreement, made between the plaintiff, and the Express Companies?

SECOND.—Whether they are discharged by reason of an implied warranty of seaworthiness in the boats, employed upon the Chagres River?

THIRD.—Whether they are discharged, upon the facts found, for any other reason?

I. The defendants knew that the goods were to be sent by the Express Companies. They were shipped as goods are usually shipped by such companies, and the receipts were, in the usual form given to shippers by that line. I am of opinion that, under such a state of facts, the insurers are chargeable with notice of the terms and stipulations usually made with such Express Companies, and that the conclusion of the Judge at special term upon this point was correct.

II. The second question has been treated as the important one in the cause. A point of the counsel of the plaintiff is, that there was no warranty on his part, express or implied, of the seaworthiness of the flat boats on Chagres River. A point of the defendants is, that the goods were injured by the leakiness and unseaworthiness of the boats, and that the defendants are not liable.

The learned Judge found, among his conclusions of law, that the presumption was, that the flat boats were unseaworthy at the time the goods were put on board of them. He deduces this result

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from facts which he states. He adds, "that the loss sustained by the plaintiff resulted from the unseaworthiness of the flat boats in which the goods were transported on the Chagres river, and not from any of the perils insured against."

The finding of unseaworthiness would, perhaps, have been in a more appropriate place among the conclusions of fact.

Assuming that this fact is established by the evidence, the question is, was there an implied warranty as to the seaworthiness of the boats used on the river? I cannot satisfy myself that the rules of law establish this.

Implied warranties in voyage policies are conditions precedent, so far as the assured engages for the seaworthiness of the vessel at the commencement of the voyage, when the policy attaches. They are peculiarly so when the policy attaches at the original port of departure. (*Watson v. Clark*, 1 Dow. P. C. 344; *Ogden v. The Amer. Ins. Co.*, 15 Wendell, 532; 20 *Ibid.* 287; *Phillips on Insurance*, 699, and cases there cited.)

The reason upon which an implied warranty of seaworthiness is founded, is the supposition that the assured is aware of the condition of the ship. At her home port, that is, the port of her owner's residence, this reason is entirely satisfactory. It is less forcible when the ship is in a foreign port, the assured living elsewhere. Yet the rule is equally absolute in this instance. It would be dangerous and subversive of the principle to allow such an exception. (*Thompson v. Hopper*, 34 L. & Eq. Rep. 275.)

It will be admitted that the reason of the rule is very slightly applicable when the insurance is upon goods. The assured has no control over the outfit of the vessel. He has no right to inspect her condition. No presumption of actual knowledge fairly arises. Yet, in this case also, the shipper is held to the implication of the warranty.

This must rest upon the ground that he has the right of selecting the vessel; that he may make general inquiries as to her fitness; and that the advantages of a fixed rule of commercial law prescribe, that he shall be treated as if he had actual knowledge.

The reason of this rule is well expressed in *Gibson v. Small*, hereafter noticed. It was there urged by the counsel for the

plaintiff in error, that the insurer of goods was by law subject to the warranty of seaworthiness, and that he was equally ignorant of, and had as little control over, the condition of the ship, as the owner who effected a time policy during a voyage.

The Chief Justice said: "This is quite true, but I think capable of a very simple explanation. At the time when the warranty of seaworthiness was established, the insurer of goods, (who was not the owner of the ship) almost universally laded his goods on board a general ship. The shipowner, in such a case, was subject to a contract, implied by law, that the ship was 'tight, staunch, and strong, and in every way fitted for the voyage,' or, in other words, 'seaworthy;' and, in the event of damage occurring by reason of this contract not being complied with, the owner was responsible. The owner of goods proposing to insure, would, in order to render the premium as low as possible, naturally represent that the goods were loaded on such a ship; and his situation, when insured, would be, that he was protected, so far as regarded damage arising from unseaworthiness, by the contract of the owner, and as to damage arising from perils of the sea, operating upon a seaworthy ship, by the contract of the underwriter, and this at the lowest possible cost."

But while the law is thus far definite and settled, the doctrine of an implied warranty is in many particulars modified and restricted.

Thus it is settled, that the implied warranty of seaworthiness does not extend to requiring the ship to be seaworthy throughout her voyage, nor at each successive port at which she is to touch in the course of her voyage. It is satisfied if she is seaworthy at the commencement of the voyage. I speak of seaworthiness in respect of the capacity and fitness of the vessel physically. Other rules appear to prevail in relation to the competency of a crew, or to what has been termed statutory seaworthiness, when the employment of a pilot has been prescribed.

Holdsworth v. Wise (1 Man. & Ryl. 673,) is a leading case. The vessel there was insured at and from Belfast, to a port or ports of loading in British America—during her stay there, and back to a port of discharge in the United Kingdom, between Falmouth and Greenock, on the west side of England and Scot-

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land, or any safe port in Ireland, to call at Cork for any orders. The insurance was against the perils of the sea. The vessel sailed from Belfast—loaded at St. Andrew's in New Brunswick, and on her voyage thence to Valentia, in Ireland, was deserted by the crew, from the apprehension that she was sinking. She was leaky when she sailed from New Brunswick, making from eleven to twelve inches every two hours. She was taken in tow, and carried into New York. The point was made, that the policy included an implied warranty of seaworthiness in the ship, and good seamanship in the crew, at every port, from which she sailed in the course of the voyage; and as she was making eleven to twelve inches water, every two hours, at the time of her leaving New Brunswick, she was not seaworthy. The Court, after advisement, held unanimously, that the implied warranty did not extend to the ship being seaworthy at every port from which she might depart in the course of her voyage.

Mr. Justice Duer, in the fifteenth lecture of his *Treatise on Insurance*, yet unpublished, says:—"The law may be considered settled both in England and this country, that so far as concerns the intrinsic qualities of the ship itself, as tight, staunch, and strong; its physical capacity, independent of crew, stores, or equipment; the implied warranty of seaworthiness refers exclusively to the commencement of the voyage, whatever may be its probable duration, and however numerous and various the risks that it embraces; and, consequently, if the warranty is then satisfied, there can be no subsequent breach. Thus restricted, the proposition is certainly true that there is no implied warranty that the ship shall continue seaworthy during the voyage."

The learned author proceeds to discuss the subject of the duty incumbent upon shipowners and their agents, to make all reasonable repairs, to keep up the competency of the ship for her further progress, where defects are discovered, and the means of removing them are accessible.

It is sufficient to observe how important the distinction is, whether the assured is bound to give evidence (sufficient to raise a presumption at least) of seaworthiness at each intermediate point of a voyage, or whether the insurers are called upon to prove neglect of a duty, and the possession of the means to fulfil

it. I understand the rule to be, that in cases of an implied warranty, the burthen is upon the assured to prove a compliance with it as a condition precedent to the attaching of the policy.

The decisions upon the question of warranty in time policies are of importance upon this point.

The result of *Gibson v. Small*, (16 Queen's Bench Rep. 141, 24th Eng. L. & Eq. Rep. 16; 3d House of Lords, Ca. 353; 3 Eng. L. & Eq. Rep., 299,) is thus stated by Earl Justice: "The Court decided that the plea there was bad, seemingly on the ground, that if a ship insured on a time policy is at the commencement of the risk in an unknown sea, and in an unknown state, the owner does not warrant that it is in the state requisite for setting out on a voyage. To this extent all the Courts are bound." (*Thompson v. Hopper*, 34 Eng. L. & Eq. Rep. 270.)

This was the decision in *Jenkins v. Heycock*, (8 Moore's Priv., Coun. Ca. 351,) where there was a time policy, and the vessel was seaworthy at the commencement of the risk, but became unseaworthy at an intermediate port. There was no continuing obligation.

And such was substantially the case of *Capen v. The Washington Insurance Company*, November 1853, in Massachusetts. The policy was made April 30; the risk to commence March 30, when the vessel was at sea. She came back to Boston in September, and was lost on a subsequent voyage. It was ruled that there was no implied warranty in the common acceptation of the term, either at the date of the policy, or the commencement of the risk, but only that the vessel was to be in existence as a vessel at the time of the commencement of the risk, capable of being made useful, if then in port, with proper repairs for navigation, and was seaworthy when she first sailed from port; or if at sea when the risk commenced, that she had sailed in a seaworthy condition, and was safe, so as to be a proper subject of insurance at the time the risk attached.

In *Jones v. The Insurance Company*, (2 Wallace, 278) Mr. Justice Grier limits the implied warranty in a time policy to a case in which it is shown, either that at the time the insurance commenced, the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so

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continued until the time of her loss; or that having come into a distant port, in a damaged condition, before or after the commencement of the risk, where she might and ought to be repaired, and the owner or his agents neglected to make such repairs, and the vessel was lost by a cause which may be attributed to the insufficiency of the ship. And *Ogden v. American Insurance Company*, (20 Wendell, 287) determines only that there is an implied warranty of seaworthiness at the commencement of the risk.

The English courts have, however, gone further, and entirely abolished the doctrine of an implied warranty in a time policy.

Lord Campbell and Mr. Justice Park had intimated an opinion in *Small v. Gibson*, that this was the rule. Lord St. Leonards, and some others, expressed their views to be that, in a time policy on an outward bound ship, about to sail from a port where the owner resides, there is an implied warranty of seaworthiness at the commencement.

In *Jenkins v. Haycock*, the Judicial Committee of the Privy Council stated their concurrence in the views of Lord Campbell; and in *Thompson v. Hopper*, and *Fawcus v. Sarsfield*, 34 L. & Eq. Rep. 270, 277; the Court of Queen's Bench, (Earl dissenting,) declared the rule expressly, that there is no implied warranty of seaworthiness in any case in a time policy; and this, whether the ship at the commencement of the risk, be at sea on her voyage, or be, at the date of the policy, in a port, about to sail on a voyage, where there are means of making her seaworthy.

These important cases show, not only that the Courts are reluctant to extend the doctrine of implied warranty, but, also that, where there had been no trace previously of a distinction between time and voyage policies, they first denied the existence of the doctrine in the former, except possibly, at the commencement of the voyage and at a home port, and then discarded it altogether. They show again, that the underlying principle of the first class of these decisions (now sustained by nearly the whole judicial strength of England) is the fact, that the owner has not knowledge of the state of the vessel, nor control over her. And the repugnance to the extension of the doctrine is strikingly manifested when we find, that when the reason ceases,

(as, in relation to a home port it does,) the rule as to voyage policies is rejected.

But the Judges take care to guard this proposition with another; that misrepresentation or concealment will still have its full effect in absolving the underwriters from the contract. "The Insurers are protected whenever there is any fraudulent representation or concealment. They may make inquiries, and introduce an express warranty, and they may always insist on a premium adequate to the risk which they will incur." Lord Campbell in *Thompson v. Hopper*.

The present case exhibits circumstances quite peculiar and new, as far as I have examined the subject. The risks were separate and distinct. They were so, not merely as variations of risks of the same character, at different stages of one continuous voyage, in one vessel; but were risks of a somewhat different nature, on successive transportations of goods, by different modes of conveyance.

The first stage (not of a voyage, but of the transportation) was by a steamer from the port of the shipper to Chagres. The implied warranty may fully apply here.

The next stage was "at Chagres, and thence by the usual conveyances across the Isthmus." The last was "at and thence by steamer or steamers to San Francisco."

In the second portion of the conveyance, no boat or vessel is named; none could be named. There is not even a general description or classification of the nature of the conveyances. Usual modes of conveyance must be assumed to have been equally well known to both parties. Is there an instance of the transfer of such a warranty from the original ship to lighters, or to any other vessel into which, upon an accident, the goods might be removed?

Beyond a doubt, the course of modern decisions is to check and restrict the theory of an implied warranty. It appears to me that the present case is one without a precedent; and I do not see that it is fairly within any principle which has been allowed to govern in the cases upon the subject.

Had the case turned (as it was mainly argued) upon this question only, I should have felt by no means convinced that there was an implied warranty of the boats on the river.

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III. But, on the assumption that there was no implied warranty of the seaworthiness or entire sufficiency of the boats, there is another point in the case which will determine the question of liability of the defendants. The loss arose from water breaking into the flat boats, saturating the boxes, it being suffered to remain without being pumped out, and the gross negligence and inattention of the crew of the boat in not doing their duty. Add to this the fact of the boats being leaky when the goods were shipped, and we have all the causes of the damage. It is found, that there was no evidence of the occurrence of any storm, or of any extraordinary peril, or of the encountering of any perils, which could have caused the leakage of the boats.

The neglect and fault of the owners of the boats, when they took the packages on board, and the culpable neglect of the crew during the transit, form the essential causes of the loss.

The causes are not literally within any of the perils insured against. The general words, "all other perils, losses," &c., in the most extensive sense, would only cover perils of the same character. Thus, a peril of the river, from a tempest, would be equivalent to a peril of the sea. • (*Moses v. The Mutual Ins. Co.*, 1 Duer, 172; 1 Phillips, 1126.)

It may now be assumed as incontestable law, that while the occurrence of a peril, actually insured against, renders the underwriters liable, though traceable to the neglect of the master and crew, yet they are not answerable for any loss, not within enumerated perils, occasioned by such neglect. (*General M. Ins. Co. v. Sherwood*, 14 Howard's U. S. Rep. 352; Phillips on Insurance, Art. 1057, 4th Ed.; *Moses v. The Mutual Ins. Co.*, *ut supra*.)

The contract with the express company exempts the latter from liability for any loss or damage "from perils of the seas, river navigation, leakage, fire, or from any cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of the principal, the agents, or servants of the line."

Therefore, if the agents were guilty of gross negligence in putting the goods on board of a boat known to them to be insufficient, or which slight attention would show them to be so, an action would lie against them.

And, on the case as made, the owners of the boats on the river

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would be responsible. The fact, that such a redress may be hopeless, cannot affect the bearing of the fact of such a legal liability of owners. (*Blackstock v. The Erie R. R. Co.*, April Term, 1857.)

The assured and assurers entered into the contract in the policy with the knowledge that the responsibility of common carriers was, as to the Express company, thus restricted. We have held that this is not enough to discharge the insurers from liability on that ground alone, viz., their inability to avail themselves of recourse by subrogation to the Express company as carriers. It is equally clear, that this fact is not to operate to impose any responsibility upon them beyond their contract.

For these reasons, I consider that the insurers are not responsible for the loss for which the action is brought, and that the judgment should be affirmed.

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A common carrier, in respect to the time of the delivery of goods received by him for transportation, when there is no express agreement, is bound only to use due diligence, and may excuse delay by showing that it was caused by some accident or misfortune occurring, without any fault on his part.

But this immunity does not extend to cases in which, although the carrier himself is free from fault, the delay has been caused by the negligence or misconduct of the agents or servants whom he employs.

The liability of a master, for a neglect of duty by his servant, exists independently of the question, whether any fault is imputable to himself; for the master, in assuming to perform a duty to third persons, assumes also the hazard of the competency and fidelity of the agents he employs.

This rule, which undoubtedly applies where the master is a natural person, applies even with greater force when the employer is a corporation.

The operations of corporations are necessarily conducted by the instrumentality of agents, and to excuse them from the performance of any duty which they owe to third persons, on the ground of the misconduct of their servants, would be, practically, to exempt them from liability for any negligence or misfeasance not the immediate or necessary consequence of a corporate act.

In the case before the Court, the delay in the transportation upon the defendants' road, of the plaintiff's goods, by which they were rendered nearly worthless, was

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caused solely by the misconduct of nearly all the engineers, and other persons, in the employ of the Company—whose services, in conducting the road, were indispensable, and who, without any justifiable cause, broke their contract with the Company, and by a combined action, upon one and the same day, abandoned their employment.

Held, that although no want of prudence or foresight in not anticipating this event, and guarding against its consequences, could be attributed to the defendants, and although it was not in their power to procure, immediately, the services of competent persons, to replace those by whom they were deserted, the law furnished no reasons for exempting them from a liability to make good to the plaintiff the loss which he had sustained from the misconduct of those whom they had employed. A sudden combination and strike of engineers is an event that may occur upon every railroad, and the hazard of its occurrence must, in all cases, rest upon the employers, who alone have it in their power to secure, by proper contracts, an indemnity against its consequences.

A Court of Justice has no power to relieve Railroad Companies from the hazard to which, the nature of their business, and the vast extent, to which it involves the employment of agents, necessarily subjects them. If a single engineer, having charge of a train, by his sudden refusal to perform his duty, should produce an injurious delay, the liability of the Company employing him, would hardly be doubted, and certainly the rule of liability cannot be varied by the number of the agents or servants who at one time are guilty of the same misconduct.

Held, that the allegation that the engineers who, in this case, abandoned their engines, were not the servants of the defendants when the delay complained of occurred, and that for this reason the defendants are not responsible, was unsupported by proof, since there was no evidence that their contracts with the Company had expired, or by any mutual act had been rescinded.

Held, further, that even upon the supposition that the desertion of the engineers put an end to their connexion with the Company, still, as this desertion was itself the cause of the delay that followed, and was a wrongful act committed by persons who, at the time, were the servants of the Company, the defendants were responsible for its consequences.

Judgment for plaintiff affirmed, with costs.

(Before HOFFMAN, SLOSSON, and WOODRUFF, J.J.)

Heard January 3, decided April 11, 1857.

THIS is an appeal by the defendants from a judgment for the plaintiff entered upon the report of a referee.

The following, as it appears from the case and the report of the referee, are the material facts upon which his decision was founded.

The action was brought to recover damages incurred by reason of delay in the delivery of goods received by the defendants, as common carriers, for transportation upon their railroad, from places in the vicinity of Hornellsville to the city of New York.

The goods consisted of potatoes, which it was alleged became decayed, and greatly deteriorated in value, by reason of the time improperly consumed, after they were delivered to the defendants, and before they reached their destination.

The precise times when the several lots of potatoes were delivered to the defendants, although apparently proved on the trial, do not appear in the printed case, furnished on the hearing, but it was conceded on the argument, by the counsel for both parties, that there was no evidence of any delivery to the defendants on a day earlier than the 19th day of June, 1854.

The potatoes reached New York on the 7th, 8th, and 10th of July following, and were then found to be very much decayed, and the proof tended to show that the damage was caused by the unusual period, during which, in hot weather, they were kept in the packages in which they were forwarded.

The answer, so far as it is material to state its contents for the purposes of the present appeal, insists that the delay and detention were reasonable and unavoidable, and were "without the fault and in spite of the reasonable and all the exertions the defendants were able to make to prevent the same."

And the answer then further proceeds, "And they aver, that said delay was caused by the wrongful refusal of the engineers, agents, and employees of the defendants, to perform their duty, and to obey the just and necessary rules and by-laws of the defendants, and by reason of such engineers and the agents of the company, and other persons preventing the running of the cars and engines of the defendants by their unlawful opposition, obstructions and combinations to prevent the same, and by preventing the defendants from procuring other persons to serve in the places of said persons so unlawfully and wrongfully obstructing the defendants in their just efforts to run their cars and enforce reasonable and necessary regulations as the good of the public demanded."

The Referee has found that the potatoes were delivered to the defendants in May and June 1854, to be transported to New York. That in the usual course of the defendants' business "they would have gone to New York in 3, 4, or 5 days." That they "were delayed and detained for about seventeen days, and by that delay were damaged, as in the complaint alleged;" and "that the

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delay was occasioned by a strike of defendants' engineers, and their refusal, for about fourteen days to work."

The Referee has then given the "history and cause of the strike," by which it appears, that in consequence of an alteration of a rule of the defendants, which alteration had become necessary, and has proved beneficial and salutary in its operation, tending to prevent accidents involving the loss of life, the engineers, (although the new rule was, when adopted, acceptable to them,) when they found it would be enforced, and on the 18th of June, gave notice that unless the rule should be previously rescinded, they would stop work on the 20th of that month, at noon. And in pursuance of such notice, one hundred and forty, out of a total of one hundred and sixty-eight engineers in the employment of the company, stopped work, and continued to refuse to work for fourteen days, by reason whereof, the defendants were unable to transport the potatoes, and the damages claimed by the plaintiff were a consequence of this inability.

And the Referee further finds that the "defendants used diligent efforts to get other engineers to run their trains, and could not."

The Referee ordered judgment for the plaintiff for the damages proved.

The notice given by the engineers, on the 18th of June, mentioned in the report of the referee, referring to the rules objected to, stated that they "take this method to inform you" (the defendants' superintendant) "that on the morning of the 20th of June, at 12 o'clock, M., we cease to work under them." And the proofs, given by the defendants, (if the language of one of the witnesses be adopted as giving the true legal effect of the acts of the engineers,) tended to show that the engineers, in pursuance of this notice, and under a preconcerted arrangement for that purpose, on the 20th of June "left the employ of the road," and, "were out of employ thirteen or fourteen days." That the company made extraordinary exertions to procure other engineers to supply their places, without success; That some of the engineers who were in their employment, and were not in the combination, refused to run engines, saying they were afraid of their lives, and that the disaffected and resisting engineers stayed around the stations, and in several cases com-

mitted violence; And that the defendants did all the business they could possibly do under the circumstances.

The other witness for the defendants characterizes the conduct of the engineers simply as a "refusal to work"—"a strike," as "stopping work on the 20th," &c.

The defendants appealed from the judgment.

About six months after the report of the referee was made, and judgment thereon entered, the defendants applied, by motion at the special term, to amend their answer in so far as it contained a statement that the delay in question was caused by "the wrongful refusal and negligence and acts of the engineers and employees and agents of the defendants." And the motion was urged under a claim, that the Court ought to conform the answer to the facts proved, which the defendants insist were, that such delay was caused by the acts of persons not then in the employment of the company, and in that respect they insisted that the report of the referee was against the evidence. This application was ordered (as the counsel appear to have understood the disposition made of the motion) to be heard at the General Term, in connection with the appeal from the judgment, and with the main question, viz., whether the defendants are liable for damages caused by a delay produced by the circumstances stated.

George Parker, for the plaintiff, respondent.

D. B. Eaton, for the defendants, appellants.

BY THE COURT. WOODRUFF, J.—We have had occasion, quite recently, to follow the decision made in the case of *Parsons v. Hardy*, 14 Wend. 215; and approved in *Wibert v. The New York & Erie Rail Road Company*, 2 Kernan, 245. The principle, of which cases, is that a common carrier, in respect to the time of the delivery of goods received for carriage, in the absence of an express agreement, is only bound to due diligence, and he may excuse delay by proof of accident or misfortune, although not inevitable in the highest sense of that word, i. e., he is not responsible for delays occurring without his fault. And upon this principle we held that, where the damages claimed

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were the mere consequences of delay, (such as deterioration in the value of the goods, arising solely from the increased time consumed in the transportation,) if the delay was excused such damages could not be recovered. (See *Conger v. The Hudson River Railroad Company*, 6 Duer, 375.)

But neither these cases, nor any other which has fallen under our observation, extend this immunity to cases in which the delay is caused either by the negligence or misconduct of the agents, servants or employees of the carrier. In *Parsons v. Hardy*, the alleged cause of delay was that the carrier's boat was run against and injured by a scow, and the decision assumes, (for the purposes of the case) that the accident occurred without any want of care and skill on his part.

The Statute of 1850 (Sess. Laws of 1850, p. 231, chap. 140, § 36), requires that railroad companies shall furnish sufficient accommodations for the transportation of all such property as shall, within a reasonable time previous thereto, be offered for transportation, &c., and shall take, transport, and discharge such property, &c., and be liable for neglect or refusal, &c.

This statute came under review in *Wibert v. The N. Y. & Erie R. R. Co.* It was insisted, that extraordinary circumstances, wholly beyond the control of the Company, and which no ordinary prudence or foresight would have anticipated, did not excuse the carrier for delay in the transportation. But the Court held otherwise. That the reasonable time mentioned in the statute must be judged of by the circumstances existing when the property was received; and an unusual accumulation of goods at their stations, exceeding the capacity of the road itself to allow immediate transportation thereon with safety, was held a sufficient excuse for temporary delay.

But the case proceeds upon an express finding that the defendants' road was in good order, and well provided with cars and engines, and as many freight trains were run thereon as could be run with safety. Nothing in the case warrants the idea that, if the negligence or misconduct of the agents or servants of the Company caused the delay, the Company could be said to be without fault.

The liability of the master for a neglect of duty by the servant exists independently of the question whether there is any fault in the master himself. True, the master is sometimes held liable

for the employment of an improper or unskilful servant, but he is often liable when no blame attaches to himself personally. And, for the same reason, he may not excuse himself for a failure to perform a duty which he owes to third persons, by showing that his servant, who was charged with its performance, neglected or refused to do it. The master, assuming to perform the duty, assumes also the hazard of the competency and fidelity of the servants whom he employs.

The same rule must be applied to corporations. Their operations are, necessarily, conducted by the instrumentality of agents, and to say that the want of fidelity on the part of their servants excuses them from the performance of any duty which they owe to third persons, would be, practically, to exempt them from liability for any negligence, or any misfeasance, which was not the immediate or necessary consequence of a corporate act.

The present case is, undoubtedly, one of some hardship. It cannot, for a moment, be claimed that a combination, resulting in a refusal to work, by one hundred and forty out of one hundred and sixty-eight men of skill, whose services were indispensable to the conduct of the defendants' business, ought to have been foreseen, when there was no just cause for such a refusal: And it was probably impossible, by any ordinary means, to have supplied their places on the day on which their refusal took effect; indeed, on so short a notice as the defendants received, it may be regarded as quite impossible. Nevertheless we must regard the hazard of such an occurrence as resting upon the employers. They alone have it in their power to secure, by proper contracts, indemnity against the consequences of misconduct by the employee. The owner of goods has no control, or right of interference in the matter, and we perceive no ground on which to relieve the defendants from the hazard to which the nature of their business, and the vast extent to which, it involves the employment of assistants, necessarily subject them. And although they are, in a degree, placed within the power of extensive combinations among their servants, that, we think, furnishes no legal reason for visiting the consequence upon third persons. Practically, the defendants in such circumstances may suffer, by the misconduct of their servants, without redress, but the law imposes no such hardship, on the contrary, it will hold the unfaith-

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ful servant liable for the direct and immediate consequences of his own fault, and this will, so far as the law can do so, give to the master indemnity.

It ought not to be doubted, and probably would not be doubted, that if, by the negligence of a single engineer in charge of a train, or by his perverse refusal to perform his duty, his train was unnecessarily delayed, the Company would be liable for the delay. When the delay is said to be excused if it happen without their "fault," the term is not used as imputing personal blame, but it means without fault on their part, in their servants or otherwise.

If this be so, it is difficult to perceive how, in principle, the rule of liability is affected by increasing the number of servants who are guilty.

An individual carrier may be so conducting his business, that it is only necessary for him to employ one servant to drive one of his wagons; Suppose that servant, when at a distance on his journey, abandons the wagon, and days elapse before the carrier hears of its non-arrival, or learns the cause; In such case, assuming that there was no want of care or judgment in selecting his servant, the delay was as to the master personally, without his fault, and in a sense unavoidable, and yet he cannot be held excused. The fidelity of the servant was at his risk—the fault of his servant is, in a legal sense, his fault.

We cannot think the rule would be otherwise if his business require him to employ a hundred servants, and they all prove unfaithful. Such a case is, of course, extraordinary, and may create a hardship, but we do not perceive that any new rule is to be prescribed for that reason. If it may be, what number of servants must combine to call for its application? No answer to this question suggests itself to our minds.

We apprehend the rule then to be, that the causes of delay, which will excuse a carrier, from the performance of his duty to carry within the usual or ordinary period required for the transportation he undertakes, must be those only which occur without his fault, or the fault of his agents, servants, or employees.

And a hindrance caused by the tortious acts of third persons, over whom the carrier has no control, and to whom he stands in

no relation involving responsibility for their acts or defaults, will excuse his delay, according to the cases above referred to.

Unless then the defendants were in the present case hindered in transporting the goods, without their fault, or that of their agents, or servants, they are liable in this action.

Their answer in terms avers that the delay was caused by the wrongful refusal of their engineers, agents, and employees to perform their duty, or to obey the defendants' just and necessary rules, etc. And the Referee has found that the delay was occasioned by a strike of the defendants' engineers, and their refusal to work.

If the views above expressed are correct, and we do not doubt that they are, then upon this finding, and this statement in the answer, the defendants are liable.

But the defendants' counsel insists that the finding of the referee, in this particular, is against the evidence, and it is sought to avoid the effect of the averment in the answer, by a motion to conform the answer to the facts proved.

If we were of opinion that the proofs showed, that when the fault of the engineers happened, which caused the delay, they had left the employment of the company, in such wise that the company were not responsible for their acts, it is not entirely clear that, under the 173d section of the code, upon which the motion is founded, we could allow such an amendment.

The defence had, in this respect, been rested upon the ground that the delay was caused by the wrongful combination, and subsequent misconduct, of the defendants' servants. The plaintiff had a right to go to trial, assuming that the persons causing the delay, were such servants. The case appears to have been tried upon that theory. Not only so; the objections to evidence indicate that the defendants' counsel insisted that evidence in support of the answer, as put in, was relevant as establishing a defence.

Under such circumstances, it is very questionable whether the proposed "amendment does not change substantially the defence." If it does, we are not authorized to grant the amendment. The defendants, in such case, are bound by their admission. The plaintiff was under no obligation to offer evidence of the fact so admitted; and the report of the referee is supported

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by the admission, although no proof was given of its truth, or though the defendants may have given some evidence which tended to prove the contrary. (*Brown v. Colie*, 1 E. D. Smith, 270.)

But, without resting upon this view of the subject, we think the report of the referee was not against the evidence upon this point, and therefore that the amendment is not proper in any aspect.

It was the strike of the defendants' engineers, the refusal of men in the employment of the company to perform their work, that caused the delay. It is true, that one of the defendants' witnesses says, that on the day agreed upon, the engineers "left the employ of the road." Be it so, and still it was that wrongful act which caused the delay. In truth, that language, in the mouth of the witness, meant no more than the testimony of the other witness, that they refused to work, or stopped work. It was not shown, or attempted to be shown, that the period of the employment of these engineers expired on the day referred to, and that their refusal to work was an actual separation of themselves from all connexion with the company; on the contrary, the correspondence, given in evidence, exhibits the defendants as inviting them to return to duty. Indeed, had it appeared that the company had made no provision for the future, but voluntarily suffered all these contracts to expire, without securing the services of the requisite number of engineers, for the time next ensuing, a further ground for charging the defendants with fault, would at once arise, in their own neglect to hire engineers, for the service, which they, of course, knew would be necessary. But the proofs do not call for this view of their liability.

It is entirely clear, that on the 20th of June, the one hundred and forty engineers were in the employment of the defendants, and were their servants, and that on that day, in utter neglect of their duty, they abandoned their engines, and suffered the work of the company to stand still.

The purpose of the proposed amendment is, no doubt, to enable the defendants to say, that after the engineers left their engines, they had, by their own act, terminated their relation to the defendants as servants, and are therefore to be regarded as strangers and *tort feorsors*, for whose acts, if they operated to

cause delay, the defendants are not liable within the cases referred to.

Doubtless, the act of one who, being a servant, is discharged, or voluntarily abandons the service, committed after the actual termination of his relation to the master, may, if it cause delay, without the fault of the master or his servants, excuse such delay, and even although the act of the servant, in so abandoning the service, was wrongful and in violation of his express engagement. But when the very act of abandonment causes the delay, the case is plainly otherwise: then it is his want of fidelity as a servant, and not the tortious act of one not a servant, which causes the delay complained of.

It is true that there was some evidence that other engineers were prevented from performing service, after the rebellious engineers had quit their work, by fear of their lives, and that some acts of violence were committed. But the scope and tendency of the evidence, as a whole, is to show that it was the sudden and faulty refusal of this large body of the Company's engineers, then their servants, to do their duty, that caused the delay in question; and we think that the finding of the referee, in this particular, is not without evidence, nor against evidence. The amendment sought ought not to be allowed.

The case is novel and peculiar; Our view of the subject seems to place the defendants in a condition of onerous responsibility; indeed, to place them in a good degree in the power of their own employees, and it may be to drive the defendants, under similar circumstances, to submit to unreasonable requirements made by their servants, involving a revocation of rules and regulations of great importance to themselves, and necessary to the preservation of the lives and safety of their passengers. In this aspect, the question assumes an importance affecting the public as well as the defendants. But the rules governing their liabilities are not, in truth, conceived in any harsh spirit. We perceive no ground, upon which they can be relieved from duties which apply to others, whose business is less extensive, and who, therefore, are less at the mercy of employees. We are bound, we think, to say it is their duty to make and enforce obedience to reasonable and prudent rules for the preservation of life and property; and also, their duty to employ faithful servants, and answer for their fidelity.

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The points urged by the appellants on the argument, embrace many particulars, but what has been said seems necessarily to cover them all, except, perhaps, one, which is founded upon a conceded error in the report of the referee, in which he states that the plaintiff's goods were received for transportation in May and June, 1854, when Counsel on both sides agree that there is no evidence that any were received prior to the 19th of June. Indeed, the referee upon proof that the goods arrived in New York on the 7th, 8th, and 10th of July, finds a delay and detention of about seventeen days. His report is, therefore, substantially in conformity to the proof; the word "May," is a clear mistake. The period of delay is correctly found, and its cause is correctly stated. This mistake (which is probably only clerical), did not affect the result, and ought not to affect it. The defendants have not been charged with any delay occurring between May and the 19th of June. They are, by the report of the referee, held liable for the damages caused by the detention produced by the misconduct of their engineers, in the interval between the 19th of June and the 10th of July; and only for the delay within that period. The mistake appearing in the report, therefore, does not prejudice the defendants. It is inconsistent with the other part of the finding, and has not, in fact, entered into the question or ground of liability. We think the judgment ought not to be reversed by reason of such a mistake, when the error has not affected the result.

The judgment should, therefore, be affirmed with costs.

JOHN M. DAVISON v. SILAS SEYMOUR and others.

The plaintiff was employed by the firm of H. C. Seymour & Co., of whom the defendants are the survivors, to procure for the firm from the directors of a Railroad Co. authorised to construct a railroad from Cincinnati, Ohio, to Illinois town, Illinois, a contract for building the road, and agreed to pay him for his services, should he succeed in obtaining the contract, the sum of \$10,000. The plaintiff concealed his own agency, and the contract was obtained through the influence, with the directors of the company, of third persons employed by the plaintiff, and acting for a

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pecuniary reward. He claimed in this action to recover the \$10,000 with interest, which the firm of H. C. Seymour & Co. had stipulated to pay him.

Held, upon a full examination of adjudged cases, that the contract, upon which the action was founded, if not in its terms, yet from the nature of the means that were used to influence the action of the directors of the Railroad Co., by an agent of the plaintiff, was an agreement, which, as contrary to morality and public policy could not be enforced.

Judgment for plaintiff reversed, and complaint dismissed with costs.

(Before HOFFMAN, SLOSSON, & WOODRUFF, J.J.)

Heard January 20, decided April 11, 1857.

THIS is an appeal by the defendants, from a judgment in favor of the plaintiff, for the sum of \$13,250.88 upon a verdict of a jury.

The cause was tried before Chief Justice OAKLEY, and a jury, in January 1856. The defendants' counsel moved, when the testimony was closed, to dismiss the complaint, which motion was denied, and the defendants duly excepted.

The facts are stated in the opinion of the Court.

Jas. T. Brady, for the defendants, appellants.

F. B. Cutting, for the plaintiff, respondent.

BY THE COURT. HOFFMAN, J.—The first question to be considered is the important one, whether the plaintiff is entitled to recover against any one, upon his own showing; whether his agreement was not one which public policy forbids to be enforced.

The case to present this question is briefly this. A company had been incorporated by the State of Illinois, to construct a railroad within that State. Acts of the States of Indiana and Ohio had also been procured, under which, together, a road was to be made from Cincinnati in Ohio, to Illinois Town. The plaintiff was employed by Hezekiah C. Seymour, one of the firm of H. C. Seymour & Co., acting on behalf of such firm, to procure for such firm contracts with such Railroad Company, for the constructing of the said roads, and furnishing and equipping the same. That by his labor and services, the contracts were procured for the firm; and that they agreed to pay him \$10,000. That the contracts were of great pecuniary emolu-

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ment; that the firm realized large profits, and the sum agreed to be paid him was reasonable.

That the firm was to receive for completing the road from Illinois town, a portion of the route, two millions five hundred thousand dollars, and, for the residue of the route, six millions five hundred thousand dollars.

Since the 24th of July 1853, the firm had sold and transferred all their interest to Henry D. Bacon, or to a firm of Page & Bacon, or Bacon, Page, & Co. Such is an outline of the complaint.

It appears that the contract with H. C. Seymour and associates, was made in November 1851,—That H. C. Seymour died in July 1853. It does not appear that anything was done under the contract in his lifetime; but it is shown, that, after his death, the whole interest in the contract was disposed of, and realized five hundred thousand dollars.

And the case made by the plaintiff is, that he recommended Seymour to one Clements, who knew nothing of him. That Clements recommended Seymour to the Directors, in consequence of the plaintiff's attestation to his qualities. That Clements was employed when the Company was preparing to let the Road, and was to have a good commission, which was adjusted afterwards at \$10,000. That Clements engaged, for these considerations, to use his influence, and did use it, to procure the contract for Seymour. That such influence was successful, or at least influential in obtaining the object. As he deposes—"We did not stand upon the street corners to do this, but went to work through third parties, and in every way we could."

In addition, when Clements first undertook this office, Davison did not even name to him the intended contractors. He did not appear before the Directors openly as Seymour's agent. On the contrary, he first informed them that he had friends at the East who could send on good men to take the contract. In the course of the negotiations he named Seymour; but this was to the Directors individually, as I infer. To the Board he was unknown.

Undoubtedly, this was the employment of Clements for a bribe, to use personal influence with the Directors to secure a lucrative contract for one, of whose capacity or responsibility he

was entirely ignorant. He was to use this secretly, and with individuals.

The directors of this great rail-road scheme, if they stood not in the capacity of public officers owing a duty to the state, yet were trustees of the stock-holders of the road, and owed the best efforts of industry, integrity, and economy to them.

No one can deny that a stipulation for any personal advantage or profit, which might attend and influence the discharge of their trust to the stock-holders, would be a violation of duty; and no engagement given to them, or contract made with them, for that object, could bear the scrutiny of the law.

If, again, one of their officers—if Mitchell, for example, empowered to negotiate, and finally to settle the contract with Seymour, had received an obligation for the payment of a sum of money for his services, it could never have been enforced.

Does the present case fall within the principle which would avoid such agreements? Numerous authorities have been cited by the Counsel of the defendants. The most of them are reviewed in *Gray v. Hook* (4 Comstock, 451.)

That case was one of an agreement between two applicants for the office of Inspector of flour, that one should withdraw his application, and aid the appointment of the other; in consideration of which, he was to receive half the emoluments of the office. This was held void at common law, though not within the statute prohibiting the sale of public offices.

The case of *Waldo v. Martin*, (4 Barnwell & Cresswell, 819, and 1st Carr. & Payne 1) is very similar, where the power of appointment was in an individual. The holder of an office resigned it in favor of another, with an agreement to procure the appointment for him in consideration of receiving a moiety of the profits. A covenant was executed to carry the arrangement into effect, and the deed was held void, as a fraud upon the party making the appointment.

Hanington v. Duchastel (2 Swanton, 167 n.) reported imperfectly in 1 Br. C. R. 115, is one of the most striking decisions of that rough, great lawyer, Lord Thurlow. The Earl of Rochford was Groom of the stole, and had the appointment of royal pages. He agreed with Hanington, to get him the place, on his giving a bond securing an annuity of £100 to one St. Feroil, who was a

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foreigner, and could not hold the station. The present defendant brought an action as administrator of St. Feroil, to recover arrears of the annuity; and this bill was brought to have the bond given up, and declared void.

Lord Thurlow observed, that there was no distinction, whether the office was public or private; none between public and private servants; and next, that the King's servants were not merely private servants. He proceeded: "It is impossible to bring the case to any other point than this, that the encouragement of the contract is contrary to the good of the public; and such good requires that the contract be put an end to; otherwise it would be a declaration of the law, that the party shall have the benefit of the contract, for the law approves what it refuses to rescind. It is a transaction on a foundation which ought not to be the basis of a civil contract. What I am to determine upon is, whether, if one person be authorized to recommend or appoint another to an office under a third person, he can, without the privity of the third person, for a private consideration of his own, recommend or appoint such other person? It does not now seem to be contended that the bond would have been good, had it been given to Lord Rochford himself; now, if the contract itself was wrong, how can I make a difference? It would, perhaps, have made the point stronger."

The case is very strong. Hanington received the profit of the station. St. Feroil, was as near as possible, innocent in the transaction. Lord Rochford sold his influence, not directly, for a personal advantage, but to provide for his tutor. If this case be law, it must have a powerful influence upon the present.

The case of *Hopkins v. Prescott* (4 Com. Bench Rep. 518), was one of a bargain to use influence in obtaining an office connected with the collection of the revenue. It was held void under a particular statute; but Coleman Justice held, that it would have been void at common law, under the decision of Lord Thurlow, in *Hanington v. Duchastel*.

To these English cases may be added *Money v. Macleod* (2 Simon & Stuart, 301) where the question was, as to the legality of a contract to account for a share of emoluments for procuring the command of an East India Company ship. A material point of difference, however, is, that the plaintiff, whose influence it was

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alleged, had been procured, was in the employ of the Company. He was not a director, nor in any way entitled to a voice in the selection. The Court directed an issue as to the consideration of the bond.

The case is not an absolute decision; but I do not see why an issue was ordered to the point of consideration, except upon the ground of an illegality, if it should be found to be what it was alleged.

The case of *Marshall v. The Baltimore & Ohio R. R. Co.* (16 Howard U. S. Rep. 325,) was one of a contract to make a certain compensation to an agent engaged in soliciting the votes and influence of members of a Legislature.

There are two propositions in the charge of the Judge, at the trial, which received the entire approbation of the Court, on a writ of error, and are of the highest pertinency and importance. I may assume that the Court was unanimous on these points. The three judges who dissented, did so upon the question of the jurisdiction of the Circuit Court.

After instructing the jury as to whether the contents of a letter was part of the agreement, which letter indicated the use of improper means with the Legislature, the Judge charged:—"That even if there were no such agreement, yet the contract was against the policy of the law, and void, if, at the time it was made, the parties agreed to conceal from the members of the Legislature, the fact, that the plaintiff was employed by the defendants as their agent, to advocate the passage of the law, and was to receive a compensation in money for his services, in case the law was passed."

"Next, if there were no actual agreement to practise such concealment, yet he was not entitled to recover, if he did conceal from the members of the Legislature, when advocating the passage of the law, that he was acting as agent of the defendants, and was to receive a compensation in case the law passed."

This authority is, to my mind, conclusive, unless there be a distinction between the cases of undue influence used with members of a Legislature, and cases of the same influence used with Directors of a Corporation.

The authorities cited in *Gray v. Hook*, especially *Fuller v. Daine* (18 Pick. 472), tend to sustain a similar principle.

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The latter case has been much criticised by counsel, and it is proper to make some observations upon it.

One Daine, the defendant, was the owner of land adjacent certain flats. It was an object to him to get the Worcester railroad company to erect a depot on these flats. He entered into an agreement with one Henry H. Fuller, that they should unite in getting up a company to purchase the flats, and procure the railroad company to locate the depot there. He was to make Fuller a pecuniary compensation (by delivery of a note executed and put in escrow) if the location took place. A company was formed; the flats purchased; and the railroad company agreed to establish the depot on the flats. Fuller was a member of this latter company at the time of the agreement, and afterwards became a member of the joint-stock company. The agreement was known only to the parties and a witness. The note had been endorsed to the present plaintiff after its maturity. It was held that the agreement was against public policy, and void. It affected the public interest. It affected the interests of the Worcester Railroad, and also those of the Joint Stock Company.

The promise in this case was, it is true, with one who held the position of a director in one of the companies. But it will be found that the reasoning of the Chief Justice rests upon principles which must extend to every contract with any one engaged to use similar means for an undue influence.

The case of *Sedgwick v. Staunton* (18 Barbour Rep. 475), does not affect these positions. Legitimate efforts were made by an avowed attorney and agent, to present to the Commissioners of the Land Office a case favorable to the applicant. See further, *Harris v. Roof's Executors* (10 Barbour Rep. 489).

I am led to the conclusion that it would be impossible to allow Clements to sustain an action upon the agreement with him. There was in it most of those elements of a vicious contract, which have avoided similar obligations in the leading cases cited. There was secrecy, applications to individuals, a concealed promise of compensation, and utter ignorance and recklessness as to the competency of the party whose cause he was promoting, and whose reward he was to receive. There is this difference, that these directors were servants of an organization inferior to that of a State, yet acting in a very spacious sphere, and repre-

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senting an extensive body of constituents. The distinction between their position and that of Legislators, upon a question like this, appears to me but shadowy.

If, then, the claim of Clements would be promptly rejected, does the present plaintiff stand in a better position? His original employment might have been consistent with an open avowed agency—with an intent, or instructions, to make it known; and thus be free from all objection. But we are left in ignorance of what the terms of such original agreement were; and how far they extended. All is indefinite, except merely an employment. He engages Clements; and here again that employment may have been perfectly free from censure on the plaintiff's part. But, we cannot separate the acts of Clements from the acts of the plaintiff. There is a legal identity between them for the purposes of this action. The plaintiff must be held, to have employed Clements to do what he did do, or to have been bound to superintend his proceedings, and free them from what was illegal. It is impossible to permit him to profit by the misdeeds of his own agent, however ignorant and exempt from them himself. His ignorance, when knowledge was a duty, becomes equivalent to a fault.

The judgment must be reversed and the complaint dismissed.

BAYARD CLARKE, and others, v. JOHN A. DAVENPORT,
and others.

This was an equity suit, and its objects were to compel the defendant Davenport to surrender to the plaintiffs the possession of certain lots in the city of New York, and to convey to them a clear title, and to account to them for the rents and profits received by him during his possession. The plaintiffs claimed title as devisees under the will of Mary Clarke, who died seized of the premises. The defendant Davenport derived his title by means conveyances from one Thomas Ash, Jr., to whom the lots were sold and conveyed by Thomas B. Clarke, the father of the plaintiffs, by virtue, it was alleged, of his powers as a trustee under certain acts of the Legislature and orders of the Chancellor. The plaintiffs insisted that the orders of the Chancellor were void, as exceeding his authority under the acts of the Legislature, and also insisted, upon other grounds, that the sale and

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conveyance to Ash were fraudulent and void. They also insisted that the defendant was bound to prove the money consideration, stated in the deed to Ash; and that no such proof having been given, the Court was bound to hold, that as against the plaintiff the conveyance was void. The conclusions of the Court upon the whole case were—

First.—That Thomas B. Clarke, on the 12th of November, 1817, when he sold and conveyed to Thomas Ash the lots in controversy, had full power and authority, as a trustee under the acts of the Legislature and orders of the Chancellor mentioned in the pleadings, to sell the same, and to give to a *bond fide* purchaser a good and indefeasible title.

Second.—That the conveyance to Ash, in its terms and upon its face, was exactly such as Clarke, under the statutes and orders before mentioned, was fully authorized to make.

Third.—That this conveyance, being a deed of bargain and sale, and its execution and delivery being admitted, was sufficient proof, in the first instance, that it was in reality founded upon the pecuniary consideration therein stated; and that the acknowledgment therein contained was also sufficient proof that the consideration mentioned was, in fact, paid.

Fourth.—That this deed, therefore, upon its face raised a use which, by force of the statute, was executed in the purchaser, thereby vesting in him a full legal title to the premises in question.

Fifth.—That the burthen of proof to impeach the validity of the deed, by showing a different consideration than that therein stated, was cast upon the plaintiffs, and that the allegations in the bill which were put in issue by the answer, that the true and only consideration was the satisfaction of an antecedent debt contracted by Clarke for his personal benefit, were wholly unsustained by proof.

Sixth.—That the title acquired by Ash was not impaired or affected by an alleged misapplication by Clarke of the purchase money received by him. The case not belonging to any class of trusts in which, as the law formerly stood, a purchaser from a trustee was bound to see that the purchase money was properly applied to the purpose of the trust.

Seventh.—That there was no evidence that could justify the Court in saying, that the orders of the Chancellor, under which the sale and conveyance to Ash were made, were procured, as is alleged, by a concealment and misrepresentation of material facts; but that, on the contrary, the truth of the representations contained in the petition of Clarke, upon which the orders were founded, was established by the report of the Master to whom the petition was referred, and by the confirmation of that report by the Chancellor.

Eighth.—That had the clearest proof been given, that the orders in question were procured by fraud, yet, as they were regular and valid on their face, the fraud would not have affected the title of an innocent purchaser, and there was nothing in the pleadings or proofs to show that actual or constructive notice was imputable to Ash.

Upon these grounds the bill was dismissed with costs.

(Before DUMR, BOSWORTH, and WOODRUFF, J.J.)

Heard December 2, 1856. Decided April 25, 1857.

THIS was an equity suit, and was one of those transferred

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from the Supreme Court to this Court, under an act of the Legislature passed in April, 1849, and which, by the terms of the law, were directed to be heard, in the first instance, at a General Term. The nature and objects of the suit, and all the questions of fact and of law arising upon the pleadings and evidence, and upon which the controversy turned, are fully stated in the opinion of the Court.

D. D. Field, for the plaintiff.

A. H. Dana, for the defendant.

BY THE COURT. DUEB, JUSTICE.—This is one of the long pending equity cases which, by an act passed by the Legislature, in 1849, were transferred from the Supreme Court to this court, and directed to be heard at a General Term thereof. It was accordingly heard upon the pleadings and proofs at the December General Term, before Mr. Justice Bosworth, Mr. Justice Woodruff, and myself, and I am now to state the conclusions, and the reasons upon which they are founded, that a careful examination of the case has led us to adopt.

The relief sought by the bill is, that the defendant, Davenport, may be compelled to surrender to the plaintiffs the possession of three lots of ground, situate on the south side of Twenty-eighth Street, between the Ninth and Tenth Avenues, in this city, and to account to them for the rents and profits received by him during the time he has held the possession. The ground upon which their title to this relief was finally placed by the learned Counsel, who, with so much ability, as well as zeal and perseverance, has conducted this and many other suits on their behalf, will hereafter be distinctly stated.

The defence is, that the defendant, Davenport, has a valid and unimpeachable title, both at law and in equity, to the lots in question, derived by sundry meane conveyances from one Thomas Ash, to whom the lots were sold and conveyed, in November, 1817, by Thomas B. Clarke, the father of the plaintiffs, by virtue of the power and authority that it is alleged were vested in him, by certain acts of the Legislature, and orders of the Chancellor, to which it will be necessary hereafter more par-

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ticularly to advert. It also appears from the bill, and the answers, that, in 1840 or 1844, the lots in question, for the purpose of satisfying certain unpaid assessments, were sold by the corporation for the term of 500 years, to the defendant, Wheeler, and that the lease granted to him by the corporation has since been assigned to and is now held by the defendant, Davenport, but without expressing or intimating an opinion as to the legal effect of this transaction, had the necessary proofs of the regularity of the assessment and sale been given, we shall dismiss it from further consideration and notice, and confine ourselves entirely to the facts and circumstances necessary to be considered in judging of the validity of the original sale and conveyance to Ash. We are satisfied that it is upon the validity as against the plaintiffs of the title thus acquired, that the case wholly turns.

The facts necessary to be stated, and borne in mind in the consideration of this question, are the following:—

The lots in controversy belonged to an estate at Chelsea, in this city, of which Mrs. Mary Clarke died seized, in the year 1802, and were included in that part of the estate which, by her last will and testament, she devised as follows: "To Benjamin Moore, and Charity, his wife, and Elizabeth Maunsell, and their heirs, as joint tenants and trustees, in trust to receive the rents and profits thereof, and pay the same to Thomas B. Clarke during his life, and after his death in trust to convey the same to his lawful issue, who shall be living at his death, in fee, and if he shall not leave such issue, then to my grandson, Clement C. Moore, in fee." Thomas B. Clarke, the equitable tenant for life, died in 1826, and upon his death the remainder in fee, whether legal or equitable, looking alone to the words of the devise, vested in the plaintiffs, who were his only children and issue then living. Hence, unless the title given to them by the devise had been previously and lawfully divested or defeated, they are the unquestionable owners of the lots in controversy.

In 1814, the Legislature, upon the joint application of Thomas B. Clarke, the trustees, and the ultimate remainder man, C. C. Moore, passed an act discharging wholly from their trust the trustees named in the will, and authorizing the Court of Chancery to appoint others in their place, with power not only to exe-

cute the trusts of the will, but to perform the duties specified in the act. The act then empowered the trustees so to be substituted to divide the lands devised into two equal parts, one part to be held by them to the uses, and upon the trusts declared in the will, the other to be subdivided into lots, which, upon certain terms, they were authorized to sell and convey, so as to pass to purchasers all the right, title, and interest, of the testatrix, Mary Clarke, at the time of her death. The proceeds of such sales the trustees were directed to invest in public stocks, and other securities, and to invest annually a moiety of the income, and accumulate the same for the benefit of the devisees in remainder, to be paid to them on the death of Clarke. The residue of the income they were directed to pay to Clarke, as it accrued for his own use and benefit, the maintenance of his family, and the education and support of his children. There are other provisions in the act which it is deemed unnecessary to state, except the declaration that the trustees to be appointed should be adjudged trustees under the will, in like manner as if they had been named and appointed therein, evidently meaning, that in addition to the powers given to them by the act, they should possess not only the same powers, but the same estate that were given and devised to the original trustees by the terms of the will—an observation, of which the bearing and perhaps the materiality will hereafter be seen.

No action was had in the Court of Chancery under this act; no trustees were appointed, and no orders made; and in 1815, the Legislature, upon the petition of Clarke, passed another act, some of the provisions of which, it will not be inexpedient to state; the statement is requisite to a full exposition and clear understanding of our views upon the questions hereafter to be considered and determined.

Before this act was passed, C. C. Moore, the ultimate remainder man, had released to Clarke all his interest in the trust estate; and the act, after reciting this fact, vested the contingent interest of C. C. Moore in the proceeds of any property that might be sold in Clarke and his heirs. It then repealed so much of the former act as required a part of the income, arising from the proceeds of the property that might be sold, to be invested; and also so much as required the several duties mentioned in

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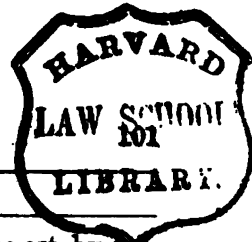
that act, to be performed by trustees to be appointed by the Chancellor. The second section of the act then authorized and empowered Clarke to execute and perform every act, matter, and thing, in relation to the trust estate; and in like manner, and with the like effect, that trustees, duly appointed under the former act, might have done; and directed him, as the trustee, to apply the whole of the interest and income of the property to the maintenance of his family, and the education and support of his children. The third section of the act declared, that no sale of any part of the estate should be made by Clarke, without the assent of the Chancellor, whose duty it should be, in giving his assent to a sale, to direct the mode *in which its proceeds*, or so much thereof as he should think proper, should be vested in Clarke, as trustee. It was then made the duty of Clarke, to render annually to the Chancellor, or to some person appointed by the Chancellor for that purpose, an account of the principal of the proceeds of every sale made by him, not including the interest, which he was to be at liberty to apply in such manner as he might think proper for his own use and benefit and the education and support of his children. The same section empowered the Chancellor, should he deem it to be necessary, to remove Clarke, as a trustee, and appoint another in his stead; adding, "subject to such rules and regulations as he may prescribe in the management of the estate hereby vested in the said Thomas B. Clarke as trustee."

Before I proceed to state the proceedings in the Court of Chancery, and of Clarke himself, under this act, I deem it expedient to explain briefly the legal effects of its various provisions, not only as those provisions are now understood by ourselves, but as, in prior cases, arising and determined in our own courts, they have hitherto, and almost uniformly, been understood and interpreted.

It is manifest that they extinguished wholly the original trust, as created by the will of Mrs. Clarke, so far as it related to the life estate of Clarke himself. Until the passage of this act, his interest and estate were purely equitable; but as the whole legal estate, which during his life was, by the terms of the will, vested in the trustees therein named, was now vested in him, his equitable was, of necessity, merged in the legal estate with which, by

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the operation of the act, it was united. Hence the act, by constituting Clarke the sole trustee, made him so exclusively for those entitled in remainder—that is, his children then living, and those who might thereafter be born. He was a trustee for them—if in any proper sense of the term he was a trustee at all—and, as their trustee, he was clothed not only with all the powers that would have belonged to trustees duly appointed under the act of 1814, but also with all the estate that would have vested in them, and that was vested in the trustees named in the will. If the will gave a fee to the original trustees, it was a fee that, by the act of 1815, was given to Clarke. Under the provisions of this act, no sales could be made by Clarke, as trustee, without the previous assent of the Chancellor.

In June, 1815, he presented a petition to the court, stating his inability, and the insufficiency of his own resources, and of the income of the property, to enable him to provide for the support of himself and family; and that in order to procure the necessary means for that purpose, he had been reduced to the necessity of contracting various debts, one of which the petition specified, and prayed that he might be authorized, by an order of the court, to sell the eastern half of the trust estate, and to apply so much of the net proceeds of the sales as might be necessary to the payment and discharge of the debts so contracted, and to invest the residue of such proceeds in his own name, as trustee, in such manner as the court might direct. This petition was referred to one of the masters of the court; who reported, that it appeared to him, from the examination of the creditors, and of Clarke himself, that the debts mentioned and referred to in the petition, with the exception of one due to the Manhattan Company, had been contracted and incurred by the petitioner, as stated in the petition, for the necessary support of his family; and that they amounted in the aggregate, as they were specified in the report, to the sum of \$5,400, and upwards; that the rents and profits of the whole property could not be made adequate to the support of the petitioner and his family, and the education of his children, even could they all be applied to that purpose; and that, after paying thereout the interest on the debts so contracted, they would be insufficient for the proper support of the petitioner and his family, according to their situation in life, and

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would admit of no provision or allowance whatever for the education of the children.

On the 3rd day of July, in the same year, Chancellor Kent made an order, approving, and founded on the report of the master, and containing (*inter alia*) the following provisions: It declared, that the assent of the Chancellor was thereby given to the sale by Clarke of the eastern moiety of the trust estate, to be divided as mentioned in the petition, and authorized and directed him to sell and dispose of the same, under and according to the acts of the Legislature, in that behalf. It further ordered, that the sales should be made under the direction of one of the masters of the court, to whom the purchase moneys of the premises sold should be paid by the purchasers, to be disposed of by him in the manner thereafter directed. It then directed, that so much of the net proceeds, arising from the sales, as might be necessary for the purpose, should be applied, under the direction of a master, in and for the payment and discharge of the debts then owing by the petitioner, and to be contracted for the necessary purposes of his family, and to be proved before the master. The order contained other provisions relative to the investment of the surplus proceeds of sales, the trusts upon which the same should be held, and the application of the income arising therefrom, which, as having no bearing on the question now to be determined, are omitted.

It is to be observed that the authority so far given to Clarke was limited to sales, and for the purpose of enlarging his powers as trustee, the Legislature, upon his application, passed, on the 29th of March, 1816, the following act:—

“Be it enacted, &c., &c., that Thomas B. Clarke be and is hereby authorized, under the order heretofore granted by the Chancellor, or under any subsequent order, either to mortgage or sell the premises, which the Chancellor has permitted, or hereafter may permit, him to sell as trustee under the will of Mary Clarke, and to apply the moneys so raised by mortgage or sale, to the purposes required, or to be required, by the Chancellor, under the acts heretofore passed for the relief of the said Thomas B. Clarke.”

Some of the questions hereafter to be determined depend materially upon the proper construction of this act. We have

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therefore given its exact words, that it may be seen whether they justify the construction that we adopt, and by which we mean to be governed. That construction I shall now proceed to state.

It seems to us an evident mistake to suppose that the act merely gave to Clarke, as trustee, an authority to mortgage as well as to sell, without affecting at all the construction of the previous acts of the Legislature and the order of the Chancellor. By referring in terms to the order "heretofore granted by the Chancellor" (which can only mean the order of July 3d, since no other had then been made), and by authorizing Clarke to apply the money, to be raised by mortgage or sale, to the purposes required by the Chancellor (which can only mean the purposes required by the order), the act of 1816, it seems to us, adopts and sanctions the Chancellor's order, so far as relates to the application of the money to be raised, just as certainly and effectually as if the order had been literally recited and in terms enacted. If the language of the act has any meaning, it gives an express authority to Clarke to apply the money to be raised by him as trustee to the purposes specified in the order—that is, the payment of debts contracted and to be contracted by him for the support of his family and the education of his children. Nor can we think that this conclusion is at all weakened by the closing words of the statute, "under the acts heretofore passed for the relief of the said Thomas B. Clarke." We cannot interpret these words as making the validity and adoption of the Chancellor's order depend upon its conformity to the prior acts which are referred to; on the contrary, if these words refer to the order at all, which may reasonably be doubted, we regard them not as imposing a condition, but as declaring as a fact that the order was made under the acts referred to; that is, in conformity to their provisions. Let the act be read with the omission of the word, "or hereafter may permit," and "or to be required" (which, as they relate exclusively to future orders, have no bearing on the question), and we think it will not be doubted that the construction we have given expresses truly the intentions of the Legislature. Certainly the Legislature could not have supposed that Chancellor Kent meant to violate the laws under which he was acting, by exceeding the authority which they conferred. It must therefore have regarded his

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order as conclusive evidence of the construction which he gave to the acts from which his powers were derived, and consequently it is this construction that the Legislature, by affirming his order, meant to ratify and declare. That such was the just interpretation and legal effect of the act of 1816, was held by Mr. Justice Bosworth and myself in *Towle v. Forney*, and we are confirmed in the opinion then expressed, not only by our own reflections, but by the full assent of Mr. Justice Woodruff.

But although the act of 1816 affirms the order of July, so far as relates to the purposes to which the money to be raised by the trustees should be applied, it effects in other respects a very material change. By the terms of the order, the moneys arising from the sales were directed to be paid by the purchaser to one of the masters of the Court, upon whom the duty of seeing that they were properly applied was directly imposed. But the act of 1816 authorized Clarke himself as trustee to apply the money raised by sale or mortgage to the purposes required by the Chancellor, and as a necessary consequence gave him the right to receive that which he was authorized and bound to apply; and such is the interpretation that was given to the act of the Chancellor in the next and last order, to which I shall refer.

This order, which, like that of 1815, was founded on the petition of Clarke, and the report of a master, was made by the Chancellor on the 15th of March, 1817, and authorized Clarke as trustee to sell or mortgage the southern instead of the eastern moiety of the trust estate, and to receive and take the moneys arising therefrom and apply the same to the payment of his debts, and invest the surplus in such manner as he might deem proper, to yield an income for the maintenance and support of his family. The order also authorized Clarke to convey any part or parts of the said southern moiety in payment or satisfaction of any debt or debts owing by him, upon a valuation to be agreed on between him and his respective creditors, adding this proviso, "provided, nevertheless, that every sale and mortgage and conveyance in satisfaction that may be made by the said Thomas B. Clarke, in virtue hereof, shall be approved by one of the masters of this Court, and that a certificate of such approval be endorsed upon every deed or mortgage that may be made in the premises." Certainly the general words of this proviso

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seem to embrace every deed or mortgage that Clarke as trustee might thereafter lawfully execute, but it has been held by the Court of Errors in *Clarke v. Van Surley*, and by the Court of Appeals in *Towle v. Forney*, that the proviso applies only to conveyances in satisfaction of debts, and that where the conveyance is for cash only, no certificate of the approval of a master is required to be endorsed. Hence it will not be necessary to consider at all the objections that have been taken to the sufficiency of the master's certificate, which it will be seen hereafter is endorsed upon the conveyance from which the defendant derives his title; for if this conveyance must be regarded by us as made for cash actually paid, and it is only upon that ground that it can be sustained, the nullity of the certificate, whether admitted or adjudged, would in no degree affect its validity. The objections that have been relied on will therefore be passed over as irrelevant.

Various questions regarding both the validity and the construction of the several acts of the Legislature, and of the several orders of the Chancellor, that have now been substantially recited, have been raised by the plaintiffs in prior suits relating to other portions of the trust estate; but all these questions, with perhaps a single exception, have in our opinion been settled by determinations of controlling authority. It will, however, be expedient to state them, in order that they may be carefully separated from those which, upon the pleadings and proofs in this case, are in our judgment alone open for determination.

The original contention on the part of the plaintiffs was, that all the acts of the Legislature that have been cited, including even the act of 1814, were wholly inoperative and void, upon the ground that the Legislature, under the constitution of the United States, and of this State, had no right so to alter the provisions of Mrs. Clarke's will, as to sanction the alienation in fee in any form and for any purpose, of any portion of the estate, to which the children of Clarke, living at his death, by the terms of the will, would be entitled. It was, however, determined by the Supreme Court, upon full consideration, in the case of *Clarke v. Van Surley* (15 Wend. Rep. 436), and by the Court of Errors in affirming its judgment (*Cochran v. Van Surley*, 20, Wend. Rep. 365), that although some of the acts in question might be

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objectionable in other respects, they must all be deemed a constitutional exercise of legislative power, and as such were valid in all their provisions. The reasons for this determination were very clearly stated by Mr. Justice Bronson, in the Supreme Court, and by Chancellor Walworth and Senator Verplanck, in the Court of Errors, and were briefly recapitulated by Mr. Justice Bosworth in delivering the judgment of this Court in *Towle v. Forney*.

Passing, then, from the acts of the Legislature to the orders of the Chancellor, it was held, both by the Supreme Court and the Court of Errors, in the cases to which I have referred, that they were made in the exercise, not of a ministerial or special, but of a judicial authority; that the sales, made by the trustee in conformity to the orders, were therefore to be regarded in all respects as judicial sales, having the same validity and effect as a sale under a judgment and execution, regular and valid on their face; that it was therefore unnecessary to determine whether the orders of the Chancellor were or were not in strict conformity with the prior acts of the Legislature—since, although as erroneous they might be liable to be reversed, they were certainly not void so as to affect the title of a purchaser in good faith from the trustee. Upon these grounds, judgment was rendered for the defendants, who claimed under a conveyance from Clarke, which was adjudged to have passed the legal title.

It must be admitted that great doubts were expressed by the learned Judges who delivered opinions in this case, whether the orders of the Chancellor, in their whole extent, were warranted by any just interpretation of the statutes under which he was acting; and it was even intimated that, upon this ground, the children of Clarke, although debarred from a recovery at law, might be entitled to some relief in equity; but the construction that we gave in *Towle v. Forney*, and must still give to the act of 1816, relieves us from the necessity of considering at all the questions that gave rise to the doubts to which we refer. The act of 1816, as we construe it, sanctioned the application by the trustee of the immediate proceeds of sales, as well as the income of proceeds invested as capital, to the maintenance and support of his family and the education of his children, and also to the satisfaction of the debts which he had then incurred, or might

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thereafter incur, for the same purposes; and it was only upon the ground that the Chancellor's order of July, 1815, directed or authorized the same application of the proceeds of sale, instead of being limited to the income of such proceeds when invested as capital, that its validity was denied or doubted. It is evident, however, that in the present case, it is quite immaterial whether the order of July was or was not valid *when made by the Chancellor*, if it certainly became so, as we hold it did, *from the time it was enacted by the Legislature*.

The terms of the subsequent order of March, 1817, limiting the word "debts," by a reasonable interpretation, to "debts" contracted by Clarke for the support of his family, are in perfect harmony with our construction of the act of 1816; and it must be borne in mind, that it is under this last order that the sale and conveyance were made upon which the defendant, Davenport, founds his title. Whether, had they been made under the first order, and before the passage of the last statute, they might not have been invalidated in a court of equity, is a question that does not properly arise, and which we therefore decline to consider. It is proper to add, that the construction that we give to the act of 1816, has not affected our opinion as to its validity, since we entirely agree with Mr. Justice Bronson (15 Wendell, R. 444), that the Legislature had an undoubted right to direct the application of the principal, arising from the proceeds of sales as well as of the income, to the purposes of the relief which the condition of Clarke and his family was believed to require.

The plain and necessary result from the observations that have now been made, is this—that Clarke, when he made the conveyance to Ash—of which a copy is annexed to the bill—had full power and authority, under the statutes and orders that have been cited, to sell the lots in controversy, and to give to a *bond fide* purchaser, a valid and indefeasible title, and just as indefeasible in a court of equity as of law. Although a trustee, he was just as competent to give such a title as an absolute owner.

The sole question, therefore, that remains to be considered is, whether, upon the evidence before us, we are not bound to hold that Ash, to whom the conveyance of the lot in controversy was made, was a purchaser in good faith and for value. The bill, indeed, admits, and the answer asserts, that the defendant,

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Davenport, had derived a title from Ash; but, as the nature of his title has not been shown, it is obvious, and was not denied by his counsel, that he stands in the same condition as the original purchaser. As the case stands before us, it is upon the validity of Ash's title that his own depends.

The conveyance to Ash was produced and read upon the hearing, and its due execution and delivery admitted.

It is an indenture of bargain and sale, made on the 12th of November, 1817, between Thomas B. Clarke, of the first part, and Thomas Ash, &c., of the second part; and after reciting that Clarke, by virtue of sundry conveyances, acts of the Legislature, and orders of the Court of Chancery, was empowered to sell and mortgage the southern moiety, or any part thereof, of the estate at Greenwich, devised by Mary Clarke, deceased, to him and his children, and that he had agreed to sell to Ash the premises thereafter described, it proceeds as follows:

"Now, this indenture witnesseth, that the said Thomas B. Clarke, in consideration of the premises, and of the sum of five hundred and twenty-four dollars, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the sealing and delivery of these presents, and the receipt whereof is hereby acknowledged, hath granted, bargained, and sold," &c., &c.; proceeding, then, by apt words of description and limitation, to convey to Ash, in fee, the lots in controversy, which, it is admitted, were a part of that southern moiety of the estate which Clarke was empowered to sell.

In conformity to the views we have already expressed, we cannot do otherwise than hold that this conveyance, in its terms, and upon its face, was exactly such as Clarke, by virtue of the act of 1816, and the subsequent order of the Chancellor, had full authority, as trustee, to make.

If this conveyance, therefore, was of itself competent evidence, that it was in reality founded upon the pecuniary consideration therein stated, and that this consideration was, in fact, paid, it is plain that the burden of proof to impeach its validity, was cast upon the plaintiff. The acts of the Legislature, the order of the Chancellor, and this deed, constituted all the proof that the defendants, in the first instance, were bound to give, to establish a perfect defence.

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The allegations in the bill are, that the consideration set forth in this conveyance was not the real and true consideration; that the only consideration, if there was any, was an antecedent debt of Clarke, contracted long previously to the date of the conveyance, and before the passage of any of the acts of the Legislature that have been referred to, and not contracted for, or on account of any of the purposes of the family of Clarke; and that no money was advanced or paid by Ash, or any other person, at the time of the execution of the conveyance, or at any other time, for or on account thereof.

We are not prepared to say that, had all these allegations, which are expressly denied in the answer, been proved upon the hearing, the title of Ash would not have been effectually overthrown, and the plaintiffs have been entitled to the full relief which they demand; but no such proof was given, or attempted to be given, and the allegations stand now, as they stand in the bill, as naked assertions, which, being contradicted by the defendants, we, as a court, are bound to reject.

It is true that there are other allegations in the bill, tending to impeach the validity of the conveyance to Ash, and in support of which, evidence was offered upon the hearing, but the evidence so offered, and which was received, subject to objection, tended only to prove that Clarke had neglected his duties as a parent and trustee, by failing to make that provision for the support and education of his children, that he was authorized and bound to make. It tended only to prove that in many respects he had abused his powers and violated his trust, but there was no proof of any such abuse or violation in respect to the sale in question; and were it admitted that his own intentions were fraudulent in making the sale, there was not an atom or scintilla of proof that his intentions were known to, or suspected by, the purchaser.

What, then, it may well be asked, are the grounds upon which a judgment in favor of the plaintiffs is now demanded? The grounds upon which their able Counsel finally placed their title to relief are the following:

First. That the burden of proving that the deed to Ash was founded upon a valuable consideration, rested upon the defendants, and that the recital of such a consideration in the deed,

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being no evidence of the fact as against the plaintiffs, and no other evidence having been given, the Court is bound to say that the deed was without consideration, and therefore wholly void.

Second. That upon the supposition that the consideration mentioned in the deed, and its payment to Clarke, were sufficiently proved, the purchaser, Ash, was bound to see—the Revised Statutes not being then in force—that the purchase-money was properly applied to the purposes of the trust, and that his neglect of this duty rendered the deed inoperative and void; and,

Lastly. That the orders of the Chancellor, under which the sale to Ash was made, were obtained by false suggestions, and a concealment and virtual misrepresentation of material facts.

These several propositions will be considered in the order in which they have been stated:—

First. The position that he who claims title under a deed of bargain and sale, valid on its face, and of which the execution and delivery are proved or admitted, in order to entitle him to read it in evidence, is bound in any case to show, by extrinsic proof, that it was really founded on the consideration which it states, struck us on the argument with great surprise, as wholly inconsistent with the views which our own experience and our knowledge of the uniform practice in our courts, and of the general understanding of the profession, had led us to entertain; nor can we say that the surprise we then felt has been at all diminished by an examination of the authorities to which, as sustaining his argument, the learned counsel for the plaintiff referred us. We have been accustomed to believe, and must continue to believe, that when such a deed is valid on its face—which it can only be when it states a pecuniary consideration—and its execution and delivery are admitted or proved, the Court is bound to say that it raised a use which the Statute executed as a legal estate in the purchaser, thereby vesting in him all the right and title that the vendor possessed or had authority to convey, and which the deed purports to convey. This deed is not evidence, it is true, of the title or authority of the vendor. His right to make the conveyance must be established by distinct and independent proof; but when this proof is given, the deed is evidence in all actions, and against all persons, of a transfer to the purchaser of the title which it purports to convey. The supposition that to render the deed

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operative at all as against a stranger, or person claiming by a distinct and paramount title, any other proof of the consideration than that which it states, must in the first instance be given, is purely gratuitous. It has no support from reason or authority. There can be no higher evidence of a contract of sale than an instrument in writing, setting forth the terms of the contract, and signed, sealed, and delivered by the seller. A deed of bargain and sale is such an instrument. It sets forth and is evidence of such a contract. The law raises from the contract thus evidenced an equitable use, which the Statute converts into a legal estate corresponding in its extent with the use declared, so that the same evidence that proves the existence of the contract, necessarily proves the transfer of title. It is not denied that the effect of the evidence depends, in many cases, upon the relation to each other of the parties to the action in which it is adduced. In many cases the evidence is conclusive. In many others, it may be contradicted and repelled. But in all, the burden of proving the falsity of the consideration stated in the deed, rests upon those who, upon that ground, deny its validity. In all cases, the consideration so stated must be held to be true, until it is proved to be false; and I am persuaded that the books may be searched in vain for any trace or intimation of an opposite doctrine.

The law, it seems to us, is equally clear as to the effect of an acknowledgment in a deed of bargain and sale, of the receipt of the purchase money. No such acknowledgment is necessary to pass the title. For that purpose, the statement of a money consideration would be alone sufficient; but without the acknowledgment, the deed would be evidence on its face of a debt due from the purchaser, and constituting a subsisting lien upon the land. It is to discharge the purchaser and the lands that the acknowledgment is inserted: where no acknowledgment of payment is found in the deed, we cannot doubt that it is competent for the purchaser to discharge himself and the land by the production and proof of a separate receipt for the purchase money, signed by the vendor, and especially when, from the death of the vendor and the lapse of time, the receipt is the only evidence of payment that can be given. We are not aware that there is or can be any exception from the rule, that a receipt for moneys given by the party entitled to receive them, whether as owner,

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guardian, executor or trustee, is in all cases *prima facie* evidence of the fact of payment, and that a trustee authorized to sell is in all cases competent to give an absolute discharge, is settled law. (Cruise, Dig., Tit. Trust, c. IV., § 30, 1, 2, 3.)

We cannot believe that the effect of a receipt as a discharge is at all varied or impaired by its incorporation in the conveyance by the trustee of the land sold. We apprehend that no court can treat an acknowledgment of payment thus incorporated, as an unmeaning form; but, on the contrary, every tribunal must hold it to be true until it is proved to be false.

Our conclusion is, that the defendant gave all the proof that, in the first instance, he was required to give, that the conveyance to Ash was founded on the valuable consideration therein stated, and that this consideration was paid at or before the execution and delivery of the deed. He therefore proved that Ash, in the full sense of the term, was a *bond fide* purchaser.

Nor has our conviction that this is a just and necessary conclusion, been at all weakened by any examination of the cases to which we were referred. It is, doubtless, true, that, in numerous cases, a person claiming protection as a *bond fide* purchaser, has been required to prove the actual payment of a valuable consideration, but it is only in cases in which his title is shown to have been affected in its origin by fraud or some other vice, that this extrinsic proof is required to be given. No case was cited, nor do we believe that any is to be found, in which a purchaser, when no evidence to impeach his title has been given, has been required to give any other proof of its validity than that which results from the execution, delivery and contents of the deed from which it is derived.

The cases upon which the counsel for the plaintiff seemed mainly, if not entirely, to rely, were of a very different character; they, indeed, tended to establish a doctrine which cannot be disputed, but which we are satisfied has no application to the case before us. That doctrine is, that the recitals in a deed are binding only upon parties and privies, and are no evidence of the truth of the facts recited against a stranger or person claiming by a distinct and paramount title. The doctrine is sound law, but is inapplicable to the case before us, for the plain reasons:

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First. Because neither a statement of the consideration in a deed of bargain and sale, nor an acknowledgment of its payment, is a recital in the legal sense of the term.

Second. Because the plaintiffs are not strangers, but privies in estate and in blood.

1. A statement of the consideration is not a recital of an antecedent fact, but a part of the *res gesta*, a necessary term of the contract of which the deed is the evidence, and therefore an essential and operative part of the deed as a conveyance. As a general rule, the recital may be omitted without impairing the efficacy of the deed as a conveyance, but the deed without the consideration as a conveyance is inoperative and void. It is from the consideration that it derives its vitality and force. So the acknowledgment of the payment of the consideration, although not essential to the validity of the deed, is part of an entire transaction and a declaration of a present fact: a declaration made by the only party competent to make it, and whose written declaration, from the nature of the fact, is the best evidence of its truth.

2. The assertion that there was no privity between the plaintiffs and their father, but that they are to be regarded as strangers, claiming by a paramount title, rests entirely upon the supposition that his authority to sell, as embracing the remainder in fee, was a naked power, not connected with or derived from any estate in the land, his only estate being that of a tenant-for his own life. In fewer words, that he was not a trustee of an estate, but simply a donee of a power. This supposition, however, we believe to be erroneous, and, therefore, cannot admit.

It has already been shown that the Legislature, by the act of 1815, not merely declared Clarke to be a trustee, but clothed him as such, with all the rights, powers and *estate* that were vested in the original trustees, by the will of Mary Clarke; and we concur with Chancellor Walworth, and Vice-Chancellor Sandford, in the opinion that by force of the statute, Clarke became seized of the legal estate in the remainder in fee expectant on his own life estate, and that the remainder devised to his children (although vested as they came into being), was purely equitable, (Opinion Chan. Walworth, 20. Wendell Rep. 377. *Williamson v. Field*, 2 Sandford Ch. R. 533. Opin. V. Chan. p. 562, and *passim*).

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Nor, as it seems to us, can the words of the statute be satisfied by any other construction.

I readily admit, however, that in judging of the nature and extent of Clarke's interest or estate, we are not to look merely at the words of the statute, but that its reasonable construction is that it was not the intention of the Legislature to give to Clarke any other or greater estate than that which was devised to the original trustees. It is upon the true construction, therefore, of this devise, that the question turns. If, by its legal interpretation, the estate of the trustee was to last no longer than during the life of Clarke, and the remainder in fee was devised to his children as a legal estate, the truth of the conclusion that in respect to this remainder he was the donee of a power, and not a trustee in the full sense of the term, will not be contested; but, on the other hand, it is certain that if by force of the will the original trustees took a fee, it is to this fee that, by force of the statute, Clarke succeeded.

The devise in the will, we have seen, was to the trustees and their heirs, in trust, to receive and pay over the rents and profits to Clarke during his life, and upon his death to convey the fee to his children then living. Such a devise, under the Revised Statutes, would be valid, as a trust, only during the lifetime of the parent, and upon his death, would vest the fee, as a legal estate, in the children then living, without any conveyance or other act on the part of the trustees or their heirs. The estate of the trustee, although a fee in its terms, would be limited in its duration by the life of the person for whom the rents and profits were to be received; and if a power to sell the remainder in fee were given to the trustees, it would be valid, if valid at all, as a power only, and not as an authority connected with, and flowing from their estate.

But the state of the law was widely different when the will of Mrs. Clarke took effect, and it continued to be so many years after the death of Clarke; and it is the law, as it existed before the Revised Statutes were in force, that must determine the question we are now considering. Previous to the Revised Statutes, it had, for a long time, been settled, that a trust to convey lands, whether immediately or on a future day certain, was valid as an active trust, and was not a use, that the statute

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would execute as a legal estate in the person entitled to demand the conveyance. (*Garth v. Baldwin*, 2 Vesey, R. 646; *Mott v. Benton*, 7 Vesey, R. 201; *Fearne Con. Rem.* 123; *Lewin on Trusts*, p. 145.)

The fee, therefore, which the trustees took under the will, was not determinable by the death of Clarke; but although upon his death his children, then living, would have been deemed in equity the absolute owners, the fee, as a legal estate, had not the trustees been discharged, would have remained, *until conveyed*, in them and their heirs. They were trustees, therefore, of the estate of the children—that is, trustees of the remainder in fee; and it was their estate as such trustees, and not a naked power, that the act of 1815 transferred to and vested in Clarke. It follows that there subsisted between him and the plaintiffs that privity of estate which always exists between a trustee and a *cestui que trust*, and which makes the acts of the former, within the scope of the trust, binding on the latter. (*Lewin on Trusts*, 18.)

Nor is this all. The plaintiffs were privies in blood, as well as in estate. The fee which the will created, and the Legislature vested in Clarke upon his death, descended to the plaintiffs as his heirs at law; and as they could not be trustees for themselves, the equitable fee devised to them by the will was then merged and extinguished in the legal title which they acquired by descent. Where a legal and equitable estate, commensurate in their extent, become united in an heir, it is undoubted law that the entire inheritance is regarded as coming from the parent, or other ancestor from whom the legal title descends; and its character is governed and determined by the same rules that would apply, had such parent or ancestor been not a trustee, but the absolute power. (*Goodright v. Wells*, Douglas, 791; *Phillips v. Brydges*, 3 Vesey, R. 126; *Selby v. Alston*, 3 Vesey, R. 339; *Wade v. Raget*, 3 Bro. Ch. Ca. 363; *Preston on Estates*, 328, 329; *Lewin on Trusts*, 16; *Cruise Dig.*, tit. "Trust," 2, § 34, 35.) It follows, that the estate which passed to the plaintiffs upon the death of their father, they took *exclusively* as his heirs, and not as devisees under the will, since their equitable title, as such, by operation of law, was then extinguished.

In the strong language of the Master of the Rolls, in *Phillips*

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v. *Brydges*, it then "ceased to exist;" and it seems a necessary consequence, that in any suit in relation to the lands, it is only as heirs that the plaintiffs can be entitled to any recovery or relief. If it be certain, as we hold it to be, that the fee was vested in Clarke, as a trustee, the plaintiffs, in the strictest sense of the term, are privies in blood, as well as in estate.

I have stated that we had discovered no case, and none had been cited, in which a purchaser, claiming under a deed of bargain and sale, had been required, in the first instance, to prove the consideration by any other evidence than that of the deed itself. I have found two cases, however, that seem to be exceptions from the doctrine, that the deed is, *per se*, evidence of the consideration which it states; but, as is not unusual, these cases are exceptions, that, instead of weakening, illustrate and confirm the general rule.

The first case is that of *Kelson v. Kelson*, 17 Jurist, 129, 17 Law and Eq. Rep. 107. The bill was filed on behalf of infant children, to set aside a mortgage, held by the defendant, as made by their father in fraud of a post-nuptial settlement, under which the children were entitled to the income of the property. The defendant contended that the settlement ought to be treated as purely voluntary, and therefore void as against him, he being a purchaser for a valuable consideration. The consideration in the settlement was stated to be, "natural love and affection, and divers other good and valuable considerations;" and the Vice-Chancellor (Wood), after hearing the counsel of the parties, stated the question to be, "upon whom the *onus* rested of proving or disproving that these general words had any substantial meaning," and he reserved the point until he should be furnished with cases bearing on its decision. Afterwards, in delivering his judgment, he said that the question amounted to this, whether the statement of certain other "good and valuable considerations," not naming them, would without more, support the settlement, at least so far as to throw upon the party impeaching the settlement, the onus of showing that there was in fact no such good and valuable consideration as was referred to, and that he had very little doubt that if a *prima facie* case were raised by the words, the onus would be on the defendant to upset it. He was, however, of opinion that the general words were not sufficient to

raise a *prima facie* case, but did not for that reason hold the deed to be void, thinking that the plaintiffs ought to have the opportunity of showing, if they could, that there was a good and valuable consideration. He, therefore, directed an inquiry, for the purpose of ascertaining whether the deed was founded on any, and what valuable consideration.

The second case is that of *Gully v. The Bishop of Exeter*, which is very clearly reported in 2 Moody & Payne, Com. Pleas Reports, 266, and is the authority on which the Vice-Chancellor, in the preceding case, chiefly relied. The cause turned entirely upon the question, whether a deed, dated so far back as 1672, was to be deemed fraudulent and void, as against subsequent purchasers, on the ground that no pecuniary consideration was stated. The considerations stated were, the sum of twenty shillings then paid, "and divers other good and valuable considerations." The judge, on the trial, left it to the jury to say, whether the sum of twenty shillings, coupled with the other words, was not a sufficient consideration, and the jury, by their verdict, sustained the deed. A new trial was moved for, on the ground that the Judge misdirected the jury, and that the verdict was against law. But the Chief-Justice, in delivering his judgment, said, that if the sum of twenty shillings was, as had been insisted, merely nominal, it might not have been an adequate consideration, but considering that the deed had been executed more than one hundred and fifty years ago, and the great depreciation in the value of money since that time, it would be too much to say that the sum of twenty shillings was at that time a merely nominal consideration, although the words, "divers other good and valuable considerations," might be regarded as mere ornament and surplusage. The other Judges concurred with these views, and a new trial was denied. The cases undoubtedly prove, that where the sum stated as a consideration in a deed of bargain and sale is so trifling, as to justify a suspicion that it was merely nominal, the question of its reality, as against a person not bound by the deed, unless founded on a valuable consideration, must be left to the determination of a jury; and that when no sum is mentioned, and a valuable consideration is stated only in general words, the burden of showing its existence and amount is thrown upon the party producing the deed; but the reasoning of the

Judges, and the actual decisions, also prove, that where a definite sum, plainly not merely nominal, is stated as the consideration, the statement, until shown to be false by the adverse party, must be received as true, and is *prima facie* evidence even against a stranger, for such in each of the cases was the legal character of the defendant. That this is the true rule, and the established rule, we cannot doubt.

II. I pass, then, to the second ground upon which the relief asked for is demanded: namely, that assuming the truth and payment of the pecuniary consideration mentioned in the deed, the purchaser, Ash, was bound to see that the money paid was properly applied by Clarke, and that as the sale was before the Revised Statutes had released purchasers from trustees from this allegation, the failure of Ash to perform this duty was alone sufficient to invalidate his title.

The argument assumes that a misapplication of the purchase-money by Clarke, was sufficiently proved, but it may be seriously doubted whether the proofs relied upon were not far too vague and hypothetical to sustain a judicial decision. Whether this be so or not, we are very clearly of opinion, that, had the proof been direct and positive, the misapplication of the purchase-money by Clarke would not have affected the validity of the title acquired by Ash. No such duty as is supposed rested upon Ash; for even as the law formerly stood, before the salutary change made by the Revised Statutes, he was not as a purchaser bound to see that the money which he had paid was duly applied by Clarke to the purposes of his trust.

The law was never so unreasonable as to impose this duty in all cases upon a purchaser from a trustee. It was imposed only in those cases in which it could be certainly and promptly discharged. It was imposed only when the trust required the immediate application of the proceeds of a sale to a certain and definite purpose; never when the purpose was general and unlimited; still less when it was future and contingent. Thus, when the trust directed the application of the money to be raised, to the payment of certain specified debts, naming the creditors and the sum due to each, the obligation upon the purchaser to see to their payment was imperative, since, as a general rule, the duty might, without difficulty, be discharged; but

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where the trust, whether of real or personal property, directed the application of purchase-money to the payment of debts generally, the purchaser was under no obligation to ascertain their amount and attend to their discharge. (2 Story's Eq. Jur. ch. 31, § 1129 to 1138, and notes and cases there cited.) And it is manifest that with still less reason could this duty be said to attach when the debts to be satisfied were not such as then existed, but such as the trustee himself, in the discharge of his duties, might thereafter contract. Here Clarke, as a trustee, was bound to apply the purchase-money to the payment, either of debts already contracted by him for the support of his family, or such as he might thereafter contract for the same purpose. The purchaser, Ash, was not bound to see that the existing debts were discharged, and he could not possibly see to the discharge of future debts, unless the law gave him the power, and made it his duty to direct and control Clarke and his family in their future contingent and daily expenses—a supposition plainly extravagant, and nearly absurd.

Under these circumstances, it is needless to consider whether, if we could hold that the duty in question attached upon Ash, his failure to perform it would have affected his title, or merely have rendered him and the defendant, Davenport, as his successor, liable to the repayment, with interest, of the consideration mentioned in the deed. The inquiry is needless, since we hold it to be certain that the payment acknowledged in the deed perfected his title, and released him from any liability for the future acts of the trustee.

It remains only to consider whether a judgment in favor of the plaintiffs may justly be rendered upon the last ground taken by their counsel, namely: That the orders of the Chancellor, under which the sale to Ash was made, were procured by a fraudulent concealment and positive misrepresentation of material facts; in fewer words, were obtained by fraud.

The power of a Court of Equity to relieve against a fraudulent order, or even judgment, is undoubted; and it was quite needless to cite authorities to prove its existence. Whether the present is a proper case for the exercise of the jurisdiction is another question. To justify its exercise, two conditions are necessary; the fraud must be clearly established, and it must be proved that

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the person against whom the relief is sought was a party or privy to its perpetration, or had notice, actual or constructive, of its existence, when he acquired his title; and here, both these conditions, it appears to me, are wanting.

We were unable to gather from the evidence, or from the argument of the counsel, what were the material facts that Clarke is alleged to have concealed. If the meaning was, that when he applied for the order of sale, it was his fraudulent intention to apply the proceeds to his own use, and not to the purposes of his trust, we cannot say, upon the evidence before us, that, at that time, such was his intention; and had this intention been proved, we cannot see that an intention locked up in his own breast, and which he might have abandoned, could have affected the validity of the order which the Legislature, if certain facts were proved, had directed the Chancellor to make. If the requisite proof was given, the order was not obtained by fraud. As to the representations of Clarke, all that he made were contained in the petition that he addressed to the Chancellor, in 1815, and upon which the order of July was founded. This petition was referred to a Master, who, upon the testimony of witnesses, reported, that the trust estate was wholly unproductive, and that a sale of portions of it to enable Clarke to discharge the debts contracted by him for the benefit of his family, and to provide the means for the future support and education of his children, was indispensable. This report was adopted by the Chancellor, and made the basis of the order of sale. This order was, therefore, a judicial determination of the truth of the facts contained in the report, and, consequently, of the truth of the representations made in the petition, and as we can have no right to say without evidence, that the testimony before the Master was false, or that he was himself guilty of collusion and fraud, it is a determination that we must hold to be conclusive.

Again, had the alleged fraud been proved by the clearest evidence, it could not have affected the title of Ash, as a purchaser for value, and without notice. It is familiar law, that when the lands of a debtor have been sold by the Sheriff under a judgment and execution, regular and valid upon their face, the title of the purchaser is not disturbed by the subsequent reversal of the judgment, even where the reversal is for error apparent

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upon the record. (*Jackson v. Roosevelt*, 13 John Rep. 97; *Wood v. Jackson*, 8 Wendell R. 9; *Woodcock v. Bennet*, 1 Cowen R. 711.) And it seems to us that the principle applies even with greater force where the judgment is sought to be impeached, upon the ground of a secret fraud. Here the order of 1817, under which the sale was made, was valid on its face, and the sale and conveyance were in strict conformity to its terms.

The order the Court of Errors has decided was a judicial act, and the sale that followed, a judicial sale. The order was, therefore, equivalent to a judgment, and the sale by the trustees, to a sale by the Sheriff. Such being the fact, we say, with entire confidence, that a Court of Equity could never allow the title of a purchaser from the trustee to be divested, by proof of a fraud, of which he was wholly ignorant, and the existence of which he had no reason to suspect; such a decision would be a very plain violation of the principles by which the administration of equity, in the protection that it extends to *bonâ fide* purchasers, has invariably been governed. (1 Story's Eq. Jur., § 64, c. 108, 630, 631; 2 ditto, § 1502, 3.) It may be admitted that the fraud of Clarke is sufficiently alleged in the bill; but we do not find that the purchaser, Ash, is charged with notice, actual or constructive; and were the charge to be found in the bill, no evidence to sustain the imputation was given or offered upon the hearing. We are bound to say that Ash, in the fullest sense of the term, was a *bonâ fide* purchaser.

It is needless to proceed further, and here I close the discussion.

Our conclusions upon the whole case are—

1st. That Thomas B. Clarke, in November, 1817, when he sold and conveyed to Thomas Ash the lots in controversy, had full power and authority, as a trustee, under the acts of the Legislature and orders of the Chancellor, mentioned in the pleadings, to sell the same, and to give to a *bonâ fide* purchaser a good and indefeasible title.

2d. That the conveyance to Ash, in its terms and upon its face, was exactly such as Clarke, under the statutes and orders before mentioned, was fully authorized to make.

3d. That this conveyance, being a deed of bargain and sale, and its execution and delivery being admitted, was sufficient proof, in the first instance, that it was in reality founded upon

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the pecuniary consideration therein stated; and that the acknowledgment therein contained was also sufficient proof that the consideration mentioned was, in fact, paid.

4th. That this deed, therefore, upon its face, raised a use which, by force of the statute, was executed in the purchaser, thereby vesting in him a full legal title to the premises in question.

5th. That the burthen of proof to impeach the validity of the déed, by showing a different consideration from that therein stated, was cast upon the plaintiffs, and that the allegations in the bill, which were put in issue by the answer, that the true and only consideration was the satisfaction of an antecedent debt contracted by Clarke for his personal benefit, were wholly unsustained by proof.

6th. That the title acquired by Ash was not impaired or affected by an alleged misapplication by Clarke of the purchase-money received by him—the case not belonging to any class of those in which, as the law formerly stood, a purchaser from a trustee was bound to see that the purchase-money was properly applied to the purposes of the trust.

7th. That there was no evidence that could justify the court in saying that the orders of the Chancellor, under which the sale and conveyance to Ash were made, were procured, as is alleged, by a concealment and misrepresentation of material facts; but that, on the contrary, the truth of the representations contained in the petition of Clarke, upon which the orders were founded, was established by the report of the master, to whom the petition was referred, and by the confirmation of that report by the Chancellor.

Eighth. That, had the clearest proof been given that the orders in question were procured by fraud, yet, as they were regular and valid on their face, the fraud would not have affected the title of an innocent purchaser, and there was nothing in the pleadings or proofs to show that actual or constructive notice was imputable to Ash.

Our decision, therefore, is, that the plaintiffs had no right to maintain this action, and that the bill must be dismissed with costs.

We have omitted to notice the decision of the Supreme Court

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of the United States, in the case of *Williamson v. Berry* (8 Howard, U. S. Rep. 495), by which, in direct opposition to that of our own Court of Errors, in *Cochrane v. Van Surley*, the orders of the Chancellor were adjudged to be not merely voidable, but absolutely void. The omission has been intentional, since, with the utmost respect for that high tribunal, we cannot think that its decision upon questions of local law, questions relating to the construction of our own Statutes, and the jurisdiction of our own Courts, carry with them any weight of authority when opposed to those of our own Court of ultimate jurisdiction. By us, at least, the latter must be regarded as conclusive evidence of the law, that we are bound to declare.

Judgment, dismissing the bill with costs. (a)

HANNAH GRIFFEN, Plaintiff and Respondent, v. LEWIS S. FORD, impleaded with HENRY BYRNS, JACOB V. D. WYCKOFF, Trustee, and others.

J. Thomas, by his last will, devised all his estate to trustees, in trust, to apply so much of the rents and profits as might be necessary to the support and maintenance of his wife during her life, and to divide the residue among his three children named in the will, during their lives. Two, only, of the children, and the wife, survived the testator.

Held, that the trust created no suspense of the power of alienation beyond the lives of the two children living at the death of the testator.

Held, that the provision for the wife was in the nature of an annuity, and was, therefore, a legacy, and a charge within the meaning of sub. 2 in § 55 of the Statute of Uses and Trusts, and that it was to this sub. of § 55 that the trust (created for its satisfaction) must be referred.

Held, therefore, that the provision created no suspense of the power of alienation during the life of the wife. The will, as construed by the Court, directed that the estate of the trustees, as to the real estate, should cease upon the death of all the children, and the fee then go to their heirs.

Held, that if the provision for the wife suspended alienation during the continuance of the trust, the suspense ceased when the trust was determined, and the provi-

(a) *Toole v. Forney*, cited *ante*, p. 104, is reported in 4 Duer, 164, and in the Court of Appeals, on affirming the judgment of this Court, in 14 N. Y. 423.

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sion then became a mere charge upon the lands in the possession of the heirs as owners.

Held, that a charge upon lands in the possession of the owner, neither at common law nor under the statute, creates a trust suspending alienation, or any trust whatever.

Such a charge is simply a debt, for the payment of which the lands are a security, and it imposes no restrictions upon the transfer of the debt or of the lands.

The testator authorized his trustees to grant leases for a term not exceeding twenty-one years from the making thereof.

Held, that these words confined the trustees to a grant of leases in possession, and that when a power to lease is thus limited, a lease, to commence in possession upon a future day, is wholly void.

Held, therefore, that a lease in question, which was executed and delivered on the 20th of December, 1849, for a term of years not to commence until the 1st of May, 1850, was void in its creation upon its face.

The testator directed that his trustees, in making leases, should reserve the best and most improved rent that could be gotten; and it was proved upon the trial, and found by the Judge, that when the lease in question was executed, a much higher rent than that reserved could have been obtained.

Held, that a trustee, directed to obtain the best rent, is bound to the exercise of reasonable diligence, as well as of good faith; and as it has clearly appeared that this diligence had not been used, the lease in question must, upon that ground, be adjudged to be void.

A lease for a longer term of years than is authorized by the power under which it is made, although bad at law, is good in equity for a term corresponding with the power, and is void only for the excess.

The counsel for the appellant insisted, that as the whole title, legal and equitable, in the house and lot to which the controversy related, was vested in the existing trustee under the will, he was the person alone competent to maintain the action; and that, as he was not the plaintiff, but had been made a defendant, the complaint ought to be dismissed.

Held, that as the object of the action, so far as relief was sought against the trustee, was to enforce his performance of his trust, it was properly brought by a person for whose benefit the trust was created, and was warranted by the express words of the very section in the R. S., that had been relied on in support of the objection. (§ 60, 1 R. S. p. 729.)

Judgment for plaintiff affirmed with costs.

(Before DUBB, BOSWORTH, and SLOSSON, J.J.)

Heard March 5; decided April 25, 1857.

THIS action comes before the Court, at General Term, on an appeal by the defendant, Ford, from the judgment entered therein on the trial thereof by the Court, without a jury. It was brought by Hannah Griffen, as plaintiff, against Henry Byrns, William J. Hodges, Lewis S. Ford, William Sands, William G. Lyon, and Jacob V. B. Wyckoff, trustee.

The plaintiff claimed to be entitled, under the will of her father, Jacob Thomas, to the rents and profits of a house and

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lot in Nassau street, in the city of New York, and the relief demanded by her complaint was, that a certain lease of the premises, made by the defendant Byrns, a former trustee, to the defendant Hodges, and also a lease of the same made by the defendant Hodges to the defendant Ford, should, as fraudulent, be declared inoperative and void; that each of these defendants should be enjoined from setting up any claim under or in virtue of these leases, and from taking any measures to possess or retain the possession of the premises by virtue thereof; and that they should be ordered to execute releases, and surrender the possession of the premises to the present trustee, Wyckoff. Wyckoff was made a defendant, upon the allegation that he had refused to be joined as a plaintiff. The defendant Ford had, in the first instance, demurred to the complaint, but his demurrer was overruled, with liberty to answer in twenty days, and, in pursuance of the liberty so given, he put in an answer. On his present appeal, he insisted that such order was erroneous. Byrns, Hodges, and Ford, the only defendants who answered, put in separate answers, and each, in his answer, insisted on the validity of the leases in question, as made in good faith, and fully authorized by the will of Jacob Thomas; and each also insisted that Byrns had acquired a valid title, by a conveyance in fee, from one Sarah Ann Sands. Upon the issues thus raised the cause was tried, before Mr. Justice BOSWORTH, without a jury, in April, 1856, and a judgment was rendered by him, granting, substantially, the relief demanded by the complaint. From this judgment Ford, and he only, appealed.

The following are the material facts of the case, as collected from the pleadings, the evidence upon the trial, and the finding of the Judge.

The plaintiff's counsel produced, and with the consent of the opposite counsel, read upon the trial a certified copy from the Records of the will of Jacob Thomas, who, it was admitted, died seized of the premises, and also read a copy of a codicil to the will. The will was made and published on the 15th of December, 1828. The codicil on the 26th of April, 1831. Between the making of the will, and of the codicil, the testator's son, James Thomas, died—and the sole effect of the codicil, after confirming all the trusts and provisions of the will, was to appoint

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one Brigham Howe an executor and trustee, in place of the deceased son. Howe never qualified, and refused to act. As all the material questions in the cause turned upon the construction of the provisions of the will, which are more or less connected with each other, an entire copy of the instrument seems necessary to be given. It reads as follows :

"In the name of God, Amen. I, Jacob Thomas, of the City of New York, being of sound mind, memory and understanding, but considering the uncertainty of human life, do make this my last Will and Testament in manner following, viz : My soul I recommend to the mercy of Almighty God, and I desire that my body may be interred with decent christian burial, in such spot as my executors may think convenient and proper for that purpose. In the first place I charge all my estate and effects of every description with the payment of my debts, funeral and testamentary expenses, and such legacies and provisions as I shall hereinafter bequeath and make subject thereto. I give, devise and bequeath unto Samuel F. Randolph, of the City of New York, Grocer, and my son James, of the same place, and to their heirs and assigns : All my messuages, lands, lots, estates, tenements and hereditaments, with the appurtenances wheresoever situate, and particularly my two houses and lots, which together are fifty feet square or thereabouts, situate in Nassau Street in the City of New York, aforesaid, and known and distinguished in said street by numbers forty-six and forty-eight, (Nos. 46 and 48,) and also all my personal estate and effects whatsoever and wheresoever : To have and to hold the same during the natural lives of my children, upon the uses and trusts hereinafter mentioned, to them, the said Samuel F. Randolph and my said son James Thomas, their heirs, executors, administrators and assigns for ever, but upon the trusts nevertheless, and to and for the intents and purposes, and with, under, and subject to the several powers, provisoes, limitations and declarations hereinafter limited, expressed and declared of and concerning the same respectively ; that is to say, (upon trust,) that they or the survivor of them, or the heirs, executors, administrators or assigns of such survivor, as long as they or he shall continue to receive the rents, issues and profits of my said two houses and lots, my tenements and hereditaments under the dispositions of this my Will, or either of them do see

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that the same are kept in all substantial and necessary repair, and also that the same may, if it shall be thought expedient, be kept insured from damage by fire; taking care, however, that the expense of such repairs or insurances fall respectively upon the person or persons beneficially interested in the same under the provisions of this my Will; and that in case of such insurance or insurances, and the happening of any such loss or damage, that the money to be received upon or by means of such insurance or insurances may be laid out in reinstating the same respectively; and that they or he do retain and apply so much of the rents and profits aforesaid as shall be necessary in that behalf, and for the purposes aforesaid respectively, and subject and without prejudice to such, the aforesaid trusts upon trust—that out of so much of the said rents and profits of all my said messuages and tenements as shall remain unapplied to the purposes aforesaid, and of all the rest of my estate and effects hereinbefore devised and bequeathed, to take, appropriate, and apply so much thereof as shall be necessary and proper for and towards the suitable support and comfortable maintenance of my wife Sally, who unhappily is at present imbecile in mind and understanding, (for which reason it is I provide for her in this way, instead of settling upon her a fixed annuity for her natural life,) as long as she shall continue my widow: And if she shall marry again, then out of the rents and profits aforesaid, to pay to my said wife, or such person or persons as she shall in writing appoint, the sum of one hundred dollars in half yearly payments, on every tenth day of May and November in every year, and a proportionate part of such half yearly payments (if any) as shall be accruing, and not have actually accrued due, at the time of her decease. The first payment of the said yearly sum of one hundred dollars to commence and be made to her on the first of those days which shall happen after her marriage; but the same may be paid into the hands of my said wife, or unto such person or persons as she shall appoint, exclusively of any such after taken husband, who is not to intermeddle therewith, nor is the same or any part thereof to be subject in any manner to such husband's control, debts, or engagements: And I further Will and declare that the receipts of my said wife, or of such person or persons as she shall appoint to receive the said annuity or the arrears thereof, shall, notwithstanding.

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ing any such coverture, be good and effectual releases and discharges for the same, or so much thereof as shall be therein expressed to have been received; and further, my executors may increase the sum, if in their discretion it shall appear to be necessary and proper: And I further declare my Will to be, that the before mentioned provision in behalf of my said wife shall be in lieu of her right of dower, and that if she shall insist upon her taking or enjoying her dower rights to the said premises hereinbefore mentioned to be devised by this my Will, then she shall take no benefit under this my Will: And I do further Will and direct that my said trustees, or the trustees or trustee for the time being, as long as they or he shall continue to receive the rents, issues and profits of my said messuages and tenements as aforesaid, but subject to the provisions and trusts aforesaid, shall and do yearly and every year distribute and pay unto and amongst all and singular my children, that is to say, to my two sons James and Jacob, and to my daughter Hannah, all the rest, the residue and surplus of the aforesaid rents, issues and profits, after deducting thereout so much as shall be necessary to answer the aforesaid trusts, and all costs and charges, and a reasonable compensation to him or themselves (my said trustees) for his or their trouble and pains in and about the trusts created by this my Will, and the same to be equally divided amongst them, the said James, Jacob and Hannah, share and share alike during their lives; and after the death of my said wife, then the whole, except what is as before excepted, shall in like manner be divided among my said children share and share alike and their heirs: and in case of the death of either of them without lawful issue, then his or her share shall go to the survivors or survivor of them in equal portions; but if such child or children shall die leaving such issue him or her surviving, that then such issue shall be entitled to the share or portion of his or her or their parent: And I further Will and direct that the share or portion and all sums of money that my said daughter Hannah shall be entitled to receive under the dispositions of this my Will may be paid into her own hands, or unto such person or persons as she shall in writing appoint, exclusively of any husband she may have, who is not to intermeddle therewith, nor is the same or any part thereof to be subject in any manner to such husband's control, debts or engagements, and she may have

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and enjoy the same separate and apart from her husband, if any she shall have; and the receipts of my said daughter Hannah, or of such person or persons as she shall appoint to receive the same or any part thereof, shall, notwithstanding any such coverture, be good and effectual releases and discharges for the same, or so much thereof as shall be therein expressed to have been received: And I do hereby further Will and direct that, subject to the several trusts aforesaid, and without prejudice to them, my said trustees do and shall, from and after the death of all my said children, stand and be seized and possessed of all and singular my real estate aforesaid, houses and lots, messuages and tenements so devised to my said trustees as aforesaid, in trust for the benefit and to the use and uses of such heirs of my said children as shall be then living; that is to say, if they all shall leave issue, then the one equal third part thereof to the child or children of my son James, and his, her or their heirs and assigns for ever; another equal third part thereof to the child or children of my son Jacob, and his, her or their heirs and assigns for ever; and the other equal third part thereof to the child or children of my daughter Hannah, and his, her or their heirs and assigns for ever; and in case of the decease of either of my said children without lawful issue him or her surviving, then my said real estate shall go to the children and heirs of the other two, each branch to have a moiety or half part thereof; and in case only one of my said children shall leave such issue, then the whole shall go to such issue in manner aforesaid; and I hereby direct my trustees or trustee for the time being, to execute and deliver conveyances of the legal estate to such person or persons as shall then be entitled to the same under this my Will; and I do hereby authorize and empower my said trustees, and the survivor of them, and the executors and administrators of such survivor, to demise or lease the whole or any part of the premises hereinbefore devised unto such person or persons, for such term or number of years not exceeding twenty-one years from the making thereof, as they or he shall deem proper or expedient, and most for the interest of those concerned, so as on every such lease so to be made there be reserved and made payable the best and most improved yearly rent or rents that can be gotten for the hereditaments and premises hereby devised: And

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my further Will is, that it shall be lawful for the said trustees or trustee for the time being, and whenever they or he shall judge it most for the improvement of the property and the interest of those who are beneficially interested therein, to apply so much of the rents, issues and profits of the said premises hereinbefore devised, as to them or him shall seem expedient and proper, in or for the purposes of repairing or rebuilding any of the messuages or buildings upon the said lots, or in improving the same; and to this end he or they may mortgage both or either of the said lots, as the occasion shall require, in order to raise money for such rebuilding, repairs or improvements. And I do hereby make, ordain, constitute, and appoint the said Samuel F. Randolph, and my son James, executors and trustees of this my last Will and Testament, hereby revoking all former Wills by me at any time heretofore made, and do declare this to be my last Will and Testament. In witness whereof, I the said Jacob Thomas, have to this my last Will and Testament set my hand and seal this fifteenth day of December, in the year of our Lord one thousand eight hundred and eighteen. Jacob Thomas, [L.S.] Signed, sealed, published, and declared by the above named Jacob Thomas as and for his last Will and Testament, in the presence of us, who have subscribed our names as witnesses thereto in the presence of the said testator, and in the presence of each other. Joel Fitz Randolph, William L. Bent, Eliza F. Randolph."

The complaint alleged that the houses and lots, described in the Will as Nos. 46 and 48 Nassau Street, are now known as Nos. 86 and 88, that both lots were covered by a mortgage, made by Jacob Thomas in his lifetime, and that after his death this mortgage was foreclosed, and under a decree made on such foreclosure, No. 88 was sold, and the avails of the sale applied to the satisfaction of the mortgage debt, and that an unincumbered title to No. 86 then became vested in the trustee, Randolph, subject to the provisions and limitations in the Will. The truth of these allegations was assumed and not denied on the trial, and was admitted upon the argument of the appeal, at the General Term. The complaint further alleged that J. Thomas, the Testator, died on the 29th December, 1831, and left him surviving his widow Sally Thomas, his daughter Hannah Griffen the plaintiff, his son Jacob Thomas, his only children, and a grand-

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child, Sarah Ann Thomas, the daughter of his deceased son James. That Sarah Ann Thomas, after the death of the testator, married the defendant William Sands, and that on the 10th of March 1852 the widow of the testator died, thus leaving the plaintiff and Sarah Ann Sands the only persons interested in the rents and profits of the property, and that Mrs. Sands died, without issue, March 2d, 1853. The truth of these allegations and dates was conceded on the trial. On the trial the plaintiff's counsel next read in evidence the lease mentioned in the complaint of the house and lot No. 86 Nassau St. from the defendant Byrns, as a trustee, under the will of Thomas, to the defendant Hodges, his executors and assigns. The lease was for the term of 21 years from the 1st of May 1850, at an annual rent of \$800, payable quarterly, and contained a provision that it might be continued for two further terms of 21 years each, at the option of Hodges, his executors, &c. It was dated, and purported to have been executed on the 20th December, 1849, acknowledged December 24th, 1850, and recorded December 29th, in the same year. The counsel also read in evidence, the lease of the premises mentioned in the complaint from Hodges to Ford: it was for the term of five years, from the 1st of May 1856, at the yearly rent of \$800, and was dated and executed on the 19th June 1854.

The appointment of Wyckoff as a trustee under the will in the place of Jas. T. Griffen deceased, was proved by the production of an order of this court, making the appointment, dated July 28th 1854.

The application of the plaintiff to Wyckoff to become a plaintiff in this action, and his refusal, were also proved. It was conceded on the trial that the several trustees mentioned in the complaint, were successively appointed, and became vested with the powers, and subject to the obligations of trustees under the will at the times, and in the manner alleged in the complaint.

The complaint alleged, that Randolph the trustee, mentioned in the will, was duly discharged as such by an order of the Court of Chancery on the 28th May 1835: that the defendant Byrns, by an order of the same Court, was duly appointed a trustee in Randolph's place. That Byrns, by an order of this court, duly made on the 14th November 1851, was removed

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from office as such trustee, and James T. Griffen appointed trustee in his stead, and that on the 29th of June 1854, James T. Griffen died. Evidence was then given on the part of the plaintiff to show that at the time the lease was made by Byrns to Hodges, the fair annual rent of the property was from \$1,800 to \$2,000.

These are all the material facts proved at the trial on the part of the plaintiff.

On the part of the defendant, Ford, a deed from Wm. Sands and Sarah Ann, his wife, to H. Byrns, dated April 22d, 1852, of an undivided half of the premises No. 86 Nassau Street—also a deed from Byrns and wife, dated Dec. 19, 1854, to the defendant Hodges, of the same undivided half, were produced and read in evidence. No evidence was given or offered on the part of this defendant to contradict that on the part of the plaintiff, as to the fair annual rent of the premises when the lease to Hodges was made.

The following are the material facts and conclusions of law found by the Court at Special Term, and embodied in the final judgment.

The Court found and adjudged that the will and codicil of Jacob Thomas, and the trusts therein contained, are good and valid, and that the house and lot, No. 86 Nassau Street, became vested in Samuel T. Randolph, and his several successors, named in the complaint, successively, as trustees of the property under the will, with power to execute the trusts thereof. The Court further found and adjudged, that Sarah Ann Sands never had any conveyable interest in the premises, and that the deed from her and her husband, of the date of the 22d of April, 1852, to the defendant Byrns, of one undivided half of the premises, and also the deed dated 19th December, 1854, from Byrns and wife to the defendant, Hodges, of the same undivided half, were and are inoperative and void, and that no title passed thereby to Byrns or Hodges; and further, that the plaintiff is the only person entitled to the income of the property, and that she is entitled to have the same leased by the trustees thereof for the time being, according to the terms of the will of Jacob Thomas, and to receive the nett income thereof. And, further, that the lease of the premises of the date of the 20th of December, 1849, executed

by the defendant Burns, as trustee to the defendant Hodges, was not made for the benefit of those interested, nor for the best rent that could have been obtained for the property, and was made without authority, and in violation of the trusts of the will, and of the obligations of Byrns as such trustee, and of the rights of those interested in the property, and therefore was and is wholly inoperative and void, and that no right or title to the premises passed by means thereof to Hodges, and that the lease of the premises of the date of June 19, 1854, from Hodges to the defendant Ford, was and is wholly inoperative and void, and that by means thereof no right, title, or interest, in the premises, passed to the defendant Ford. The Court also found that the trustee, the defendant Wyckoff, neglected and refused to adopt any measures, or take any proceedings, to set aside the said lease, though requested by the plaintiff so to do, before the commencement of this action.

The judgment then proceeded to grant substantially the relief prayed for in the complaint. To each finding of facts and conclusion of law in the judgment so rendered, the Counsel for the defendant Ford severally, and duly excepted.

Albert Matthews, for the appellant, Ford.

The demurrer was well taken, and the order overruling it should be reversed. Since the code a *cestui que trust* has no estate, or interest, legal or equitable, in the trust property, the whole being vested in the trustee, who is, therefore, alone competent to maintain any action relative to the trust. If he refuse to bring an action that ought to be brought, a Court of Equity may, by a proper order, compel him, or may remove him (1 R. S. 730, § 70), and appoint another who will act (*L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. R 34; 1 R. S. 729, § 70). Next, as to the merits, we insist that if the will is valid, the lease from Byrns to Hodges was not so far beyond the discretionary powers of the trustee, as in the absence of fraud to render it void—no fraud was proved or found by the Court, and the lease was therefore valid, at least in equity, until the expiration of the first term of twenty-one years from its commencement.

But we insist that the will of Jacob Thomas is inoperative

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and void. The devise in trust embraces all his property, and is a limitation suspending the power of alienation beyond the period allowed by law, that is, the lives of two persons in being. The devise suspends the power of alienation during the lives of four persons living at the death of the testator, viz. his widow, and his two children, and his granddaughter; for the interest of each of these was, from its nature, unalienable, nor could they give any authority to the trustees to convey. (*Van Eps v. Van Eps*, 9 Paige, 237; *L'Amoureux v. Van Rensselaer*, 1 Bar. Ch. R. 84;) and even if the devise be construed as a "power in trust," the objection is equally fatal. (*Hawley v. James*, 16 Wend. 61; *Lang v. Ropke*, 5 Sand. 368.)

The will being void, the lease from Byrns to Hodges was void on its face, and Sarah Ann Sands became the owner in fee of an undivided half of the premises in question, and Byrns and Hodges, being successively grantees of this one half, are estopped as against a person claiming under them, from invalidating the lease. (*Jackson v. Bull*, 1 John. Cases 81; *Same v. Murray*, 12 John. 201; *Same v. Stearns*, 13 John. 316; *Crane v. Van Horne*, 1 Paige, 455.) The lease, as made by a tenant in common, being valid in respect to an undivided half of the premises, this action fails in its "entire scope," and the complaint should be dismissed. At any rate, the defendant Ford, being a *bond fide* purchaser, ought not to have been charged with costs—and so far at least the judgment at the Special Term is erroneous.

Asa Child, for the plaintiff, respondent.

The judgment at Special Term was, in all respects, correct, and should be affirmed with costs. The will of the testator is valid in all its provisions within the meaning of the R. S., by which we admit that its construction must be governed. The devise in trust to his executors suspended the power of alienation only during the lives of his children. The trustees are to have and hold the property "during the natural lives of my children," and it is afterwards expressly provided that "upon the death of all the children," the trustees should convey to their issue then living. It was therefore the manifest intention of the testator, that, upon the death of all his children, the estate of the trustees

should wholly cease. Two only of the children named in the will were living when it took effect, the plaintiff and her brother Jacob, and, consequently, it was only during their lives that the power of alienation was suspended. The provision made for the widow created no suspense of alienation during her life. Its only effect was to create a charge giving her a lien upon the property, but this was an interest which she might have extinguished at any time by a release or grant. Upon the death of the children, had she survived them, under the provisions of the will, properly understood, an absolute fee might have been conveyed to a purchaser by her uniting in the grant.

The will being valid, it follows, that the lease from the trustee, Byrns, to Hodges, as contravening the provisions of the will, and violating his trust, was void as soon as it was executed; and as Hodges took no title under it, he could give none to Ford; the lease from him to Ford was therefore necessarily void. The lease to Hodges is, on its face, a lease in reversion, or *in futuro*, within the meaning of those terms, and it is settled law, that a power to lease for a certain term of years without expressing in possession, and not in reversion, authorizes leases in possession only; and consequently a lease purporting to be an execution of the power is wholly void, when the term of years which it grants is to commence in possession upon a future day.—*Sinclair v. Jackson* (8 Cowen, 548), *Lady Sussex v. Wroth* (Cro. Eliz. 5), *Shecomb v. Hawkins* (Cro. James, 318), *Allen v. Calvert*, 2 East. 376, Willis on Trustees 141, Sugden on Powers, 368, 370. In this lease the term granted is not to commence in possession until the 1st of May following the date of the lease, and the lease moreover gives an option to the lessee to extend the term to 68 years, a provision plainly and wholly unauthorized.

There is another ground upon which it is equally certain that the lease must be declared void. The will requires that the trustees, in making a lease, shall reserve the best rent that can be obtained; and Byrnes, therefore, on making the lease in question, in which the rent reserved is only \$800, exceeded his power, and violated his duty. It was proved upon the trial, that a fair rent would have been \$2,000. The transaction was palpably fraudulent.

The only question that remains is, whether this action is to be

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defeated upon the technical ground that it ought to have been brought in the name of the trustee; and we insist that the objection is not merely technical, but groundless. The plaintiff, being entitled to the rents, is the sole party injured by the fraudulent lease that she requires to be given up and cancelled. To deny her title to redress, would be to violate the plainest rules of justice. It is true, the redress might have been obtained by an action in the name of her trustee; but the cases to which I shall refer are conclusive to show that, when a trustee refuses to act, the action may be brought by the *cestui que trust*, and the trustee be made a defendant; and such is the present action. (8 Maddock, Ch. R. 375; Jacob's R. 324; 4 Russell, 272; 1 Ball & Beatty, 181; 2 Brown, Ch. R. 225; Skinner, 319; 3 Swanst. 1; 2 John. Ch. 238, 1 Paige 20.)

BY THE COURT. DUER, J.—An attentive examination of the interesting questions which this case involves, has compelled our assent to nearly every proposition for which the learned Counsel for the plaintiff contended, and we are therefore under the necessity of assenting to his conclusion, that the plaintiff was fully entitled to the judgment she has obtained.

The first question relates to the validity of the will of her father, from which she derives her title, and who, it is admitted, died seized of the house and lot in controversy.

We strongly incline to think that this is a question which the defendant, Ford, was not at liberty to raise. In his answer and upon the trial, as well as upon the argument before us, he has insisted upon the validity of the lease to Hodges, as a proper execution of the power to lease given by the will. It is from the will, therefore, that he derives the title he has asserted, and it may well be doubted whether he was not estopped from denying the legality either of its execution or its provisions. But, as this objection was not taken by the counsel for the plaintiff, upon the hearing, we do not think we should be justified in now saying that, had it been raised, it would have been allowed to prevail. It is our invariable rule, never to decide a cause upon a point not argued by counsel, unless it has been submitted without argument and without points. We proceed, then, to the main question, whether the trust created

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by the will suspended the power of alienation, as to the property it embraced, beyond the period limited by the statute. And if we are to look merely at the terms of the will, it cannot be denied, that even upon the plaintiff's construction, the devise in trust was wholly void. By its terms, it suspended the power of alienation during the lives of those children whom it named, and had all these been living when the testator died, there would have been a clear suspension of the power of alienation beyond the statutory period. Two, only, of the children, however, were then living; and in applying the statutory rule to the provisions of a will, it is certain, that lives in being at the death of the testator, are alone to be considered. (*Lang v. Ropke*, 5 Sand. S. C. R. 375.)

The question, then, is, whether the devise to the trustees is so framed as to involve a suspense of the power of alienation, for any period beyond the lives of the two children who survived the testator, the plaintiff and her brother; for, if it was the intention of the testator, as collected from his whole will, that the estate of the trustees should then cease, and the property become alienable, the objection that the trust creates what in judgment of law is a perpetuity, is plainly groundless; and no other objection to its legality has been, nor, as we think, can be stated.

We are far from saying, although the conclusion at which we have arrived is favorable to the plaintiff, that this question is free from difficulty; for it cannot be denied that the provisions of the will are somewhat perplexed, and involve a seeming contradiction. The devise to the trustees embraces all the property, real and personal, of the testator, and especially his two houses and lots in Nassau street; and the trustees are to have and hold the same, during the natural lives of his children, upon trusts that, rejecting superfluous words, may be stated as follows:—

1. As to the two houses and lots: that the trustees, as long as they shall continue to receive the rents and profits thereof, shall see that the same are kept in necessary repair, and, if thought expedient, be insured against damage by fire, the expenses of such repairs and insurance to be borne by the persons beneficially interested under the provisions of his will.

2. After defraying these expenses, to apply out of the rents and profits not only of the said tenements, but of his whole estate,

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so much as may be necessary towards the proper support and maintenance of his wife Sally.

3. In case of the marriage of his wife, to pay to her out of the rents and profits aforesaid, in half-yearly payments, an annuity of one hundred dollars. This provision for his wife to be in lieu of her dower, and if she shall insist upon her dower, then she is to take no benefit under his will.

4. To distribute, and pay yearly, the rest and residue of the aforesaid rents and profits so long as the trustees continue to receive those of the two houses and lots, to his three children, naming them, share and share alike; in case of the death of either, without issue, his or her share to go to the survivors, but if either shall die leaving issue, the children to take the share of the parent so dying.

5. After the death of his wife, to pay the whole of the aforesaid rents and profits, deducting the expenses, costs, and charges before mentioned, to his children and their heirs, share and share alike.

6. The will then directs, after some special provisions relative to the payment of the share of his daughter, the plaintiff; that the trustees, from and after the death of all the children, shall stand seized and possessed of all his real estate, including the two houses and lots, in trust for the benefit and to the use and uses of such heirs of his children as shall then be living, and shall execute and deliver conveyances of the said real estate to the persons then entitled under the will.

Although in this analysis of the trusts of the will, the provisions are given in a very condensed form, we are satisfied that none have been omitted that have the slightest bearing upon the question to be decided. We proceed then to the observations, that a full exposition of the meaning and legal effect of the trusts of the will, as we have stated them, seem to require.

If the question stood alone upon the words in the *habendum* clause, "to have and hold the same during the natural lives of my children," it would be wholly free from doubt, since it cannot be denied that these words limit the duration of the estate of the trustees to that of the lives of the two children living at the death of the testator. To language so explicit, no other construction can be given. It is this construction, therefore, that

we are bound to adopt, unless we shall find that it is plainly overruled by subsequent and inconsistent provisions in the will.

The first trust of the will following the *habendum* clause, as we have seen, is confined to the rents, issues, and profits of the two houses and lots, and is to last no longer than the trustees shall continue to receive them, and these last words seem to imply that the estate of the trustees in the houses and lots was meant to terminate before the trust embracing the residue of the property devised: an inference which is strengthened by the repetition of the words in a subsequent clause.

The second trust relates to the provision made for the support and maintenance of the wife of the testator. Whether this provision, from its nature, and by its necessary legal effect, operated to suspend the power of alienation during the life of the wife, as well as during the lives of the children, and in relation to all the property, including the two houses and lots that the devise in trust embraces, is a question that we shall hereafter and separately consider. It is enough now to say, that there are no express words, inconsistent with those in the *habendum*, by which the estate of the trustees is made to cease upon the death of the children. There are no words by which the trust estate is made to continue during the life of the wife, should she survive the children.

The next trust provides a fixed annuity for the widow, in the event of her marriage; and, by a subsequent clause, the whole provision for her that the will makes, is made to depend upon her election to take or renounce her dower. That she elected to take the provision in the will, in lieu of her dower, was assumed and conceded upon the hearing before us. Indeed, the argument as to the effect of this provision in the will, rested entirely upon this concession. Had she taken her dower, the provision in the will would have been rendered void, and no question as to its effect could have arisen.

The fourth trust merely directs the payment of the surplus rents and profits to the three children during their lives, share and share alike, and requires no special observation, except that this payment is to be made only while the trustees should continue to receive the rents and profits of the two houses and lots.

The trust that follows, provides, that after the death of the wife, the whole rents and profits, deducting expenses and charges,

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should be paid to the children; and it was upon the words, "after the death of my wife," that the able counsel for the appellant laid much of the stress of his argument, contending that they necessarily implied that the trust estate, and the consequent suspense of alienation, were meant to continue during the life of the widow—and such, at first view, might seem to be their import. But a brief reflection sufficed to convince us that such is neither the necessary import nor the reasonable construction of those important words. The death of the wife which is referred to, is her death during the lifetime of the children, and is therefore perfectly consistent with the supposition that the estate of the trustees was intended to cease upon the death of all the children; that it was intended to cease, notwithstanding the wife might survive them; and it is plain that upon this construction the suspense of the power of alienation is confined to the lives of the two children, living at the death of the testator, just as certainly as if they alone had been named in the will as the persons entitled to receive the whole rents and profits during their lives. Had the testator, by an agreement in his lifetime, charged the rents and profits of his estate with the payment of an annuity, during the lives of his children, living at his death, we apprehend that it would never have been contended that the life of the annuitant was to be taken into consideration in determining whether the suspense of the power of alienation exceeded the statutory limits. If in the case before us, no payments were to be made by the trustees to the widow, after the death of the children, it is in principle exactly the same as that which we have supposed. Nor is this all; the construction that we have shown that the words used plainly admit, is also that which, as in itself the most reasonable, we are bound to adopt. It is only by its adoption that the provisions of the will can be rendered consistent, and a palpable contradiction be avoided; and to reject it would be to deny the authority of one of the safest and soundest rules of interpretation that in the construction of written instruments, Courts of justice have hitherto held themselves bound to follow. The construction of the appellant would strike the words "during the natural lives of my children" from the *habendum* clause, and would rob of their meaning the provisions next to be referred to, and which

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comprise the last duties that the trustees are required to perform. These provisions declare that the trustees, from and after the death of all the testator's children, shall stand seized and possessed of all the real estate, houses and lots devised to them in trust, for the benefit and to the use or uses of such heirs of his children as shall then be living; and shall execute and deliver conveyances of the real estate to such person or persons as shall then be entitled under the will. We do not think that it is possible to state a reasonable doubt as to the meaning and legal effect of these provisions. The trust which they declare, is not active but passive, and the operation of the words, "for the benefit, and to the use or uses," is not at all affected by the subsequent direction to convey. The direction, if not unmeaning, was wholly superfluous. It is true that at common law, a direction to convey was deemed an active trust, so that until executed the legal estate remained in the trustees, (*Clarke v. Davenport*, ante, p. 95,) but as the Rev. Stat. have abolished all active trusts except those which they expressly authorize, it is certain that the rule of the common law can no longer be followed. The use which the previous words, "for the benefit," &c., declare, is a use which had the wife survived the children, the statute would have executed instantly upon the death of the children, by vesting in their heirs the whole estate, legal and equitable, (1 R. S., pp. 727, 728, § 47, 49;) nor would any conveyance, or demand of a conveyance, have been necessary to have enabled them to recover the possession, had the trustees refused to surrender it. It must have been held that the words of the will, interpreted by those of the statute, gave them an immediate and perfect title. It follows that unless we expunge from the will the provisions we are considering, we are bound to say that it was the certain intention of the testator, that upon the death of all his children the trust created by the will should, as to his real estate, wholly cease and determine. We add, that the same construction must have been given to these provisions, even had the will in a prior clause in terms declared that the trust estate should continue during the life of the wife, for the rule appears to be settled that where there are two repugnant clauses in a will, it is the intention which the last declares that the Court is bound to execute.

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The result of this examination of the will is, that it contains no clause or expressions from which it can be fairly deduced that the testator intended that the trust estate should continue during the life of his wife, but that, on the contrary, it appears to be certain that, in respect to his real estate, he intended it should cease wholly and absolutely upon the death of his children, whether his wife should or should not survive them. Hence, if the suspense of the power of alienation was limited by the duration of the estate of the trustees, it lasted no longer than the lives of the two children living at the death of the testator, and had therefore no effect on the validity of the will.

It is said, however, that a suspense of the power of alienation, during the life of the wife, was necessarily created by the nature of the provision made for her support, and which it was the manifest intention of the testator that she should continue to receive, in one or other of its alternative forms, during her life. As this provision was payable out of the rents and profits of the whole estate, real as well as personal, it is asserted, that its necessary effect was to suspend the power of alienation, in respect to the whole and every part of the estate, so long as the obligation of its payment remained in force, and that, to secure its payment, the trust ought therefore to be construed as remaining in force for the same period—namely, the life of the wife.

The argument is specious, but it is not difficult to show that it rests upon premises erroneously assumed. It cannot be denied that the provision for the wife was meant by the testator to be a provision for her life: such is the necessary interpretation of the language he employs; nor do we at all doubt, that, had the wife survived the children, the obligation for the payment of the provision would have remained in force. But as we must hold that the estate of the trustee was intended to cease upon the death of the children, the provision for the wife, had she survived the children, would no longer have been the subject of a trust, since the only trust in relation to it which the will creates, would then have ceased; but it would have been effectual simply as a charge upon the rents and profits of the real estate, to which the heirs of the children would then have been entitled. Whether the charge would have operated as a suspense of alienation, is a question that will hereafter be considered.

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It was assumed by the learned counsel for the appellant, that, as the provision for the widow was payable out of rents and profits, the trust for its payment was referable, and could only be referred to the 3d sub. in § 55, in the Statute of Uses and Trusts, which sanctions an express trust "for receiving the rents and profits of lands, and applying them to the use of any person during the life of such person," and that, as the beneficial interest of the widow was inalienable under § 68, and any conveyance of the trustees would have been void under § 65—it was a necessary consequence that the power of alienation was wholly suspended, so long as the provision continued to be payable.

The error of this argument consists in its premises, for, be they even admitted to be true, the truth of the conclusion could not be disputed—that a trust, under sub. 3 in § 55, suspends the power of alienation is settled and familiar law. But if the trust for the widow was not a trust of this class and description, there is no ground whatever for the assertion, that it suspended at all the power of alienation; and that it is not such a trust, we consider to be settled by the decision of the Court of Errors, in *Hawley v. James*, as interpreted and followed by this Court in *Lang v. Ropke*. The provision for the widow, although limited to her support and maintenance; was in its nature an annuity, and its amount as such; that is, the sum to be annually paid might have been fixed by a Court of Equity, (2 Hare, 607; 10 Simons, 293.) An annuity, when created by a will, is a legacy, and when payable out of rents and profits, a charge upon lands, and it is therefore to sub. 2 in § 55 that the trust, for its satisfaction, must be referred. Hence, in this case, had the three children named in the will survived the testator, although the trust for them, as creating an undue suspense of alienation, would have been clearly void, the provision for the wife, as free from the objection, would have been sustained as valid. Such, under exactly the like circumstances, was the judgment of the Court in *Hawley v. James*, and it is only to be explained upon the ground, that a trust for the payment of an annuity out of rents and profits, although it may seem to fall within the words, is not a trust for the reception and application of rents and profits within the meaning of the statute. The interest of a person for whom a trust is created, under the 2d sub. of § 55, is not made

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inalienable by any provision in the statute. Hence, the wife in this case had an unrestricted power of disposition. She might have extinguished the provision made for her by a release, or have accepted a sum in gross in its satisfaction. It created, therefore, no suspense of alienation, even during the lives of the children and the continuance of the trust.

But even were a different construction to be given to the statute,—the construction for which the appellant contends—it is certain that the expiration of the trust must have been held to put an end to any suspense of alienation that its terms created. Had the wife survived the children, the provision for her support would have been a charge upon the real estate in the possession of the heirs of the children, as owners; and it would be an extravagant as well as novel doctrine that a charge upon lands in the possession of the owner, creates the relation of trustee and *cestui que trust*, so that where the charge is upon rents and profits, neither the owner can sell the lands nor the person entitled transfer or assign the charge. A charge upon lands, in the possession of the owner, is simply a debt, for the payment of which the lands are a security.

It is certain that the common law in such a case imposed no restriction upon the transfer either of the lands or of the debt, and to our minds it is equally certain that none has been imposed by the statute. It is needless, however, to pursue the discussion, as the point has been expressly decided by this Court, and this decision, unless demonstrated to be wrong, we are bound to follow. (*McGowan v. McGowan*, 2 Duer 57.)

Hitherto we have taken no notice of the allegation that there was a suspense of alienation during the life of the granddaughter of the testator, Sarah Ann Sands, as well as during the lives of the children and widow. Although this position is taken in the printed points of the appellant's counsel, according to our recollection he laid very little if any stress upon it in his argument, probably from the conviction that it was open to a short and conclusive reply. It is very doubtful whether the granddaughter, under the provisions of the will, became entitled, upon the death of the testator, to any share of the rents and profits, but, admitting that, according to the intention of the testator, she then became entitled to the share that would have belonged to her

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father, had he survived the testator, and that her interest, so long as it continued, was just as inalienable as that of the children, still it is manifest and certain that her power of alienation was suspended, not during her life, but only during the lives of the children, since, had she survived them, she would have been entitled as heir to an absolute fee in the real estate, from which the rents and profits in which she had shared had arisen. Her power of disposition would then have been unlimited.

Our conclusion is that the will of the testator created no suspension of the power of alienation beyond the lives of the two children living at his death, and consequently that the devise to the trustees was, in all respects, valid.

The will being valid, it follows, and it is not denied, that the deed from Sarah Ann Sands, and her husband, to the defendant Byrns of an undivided half of the house and lot in question was wholly void, since at the time of its execution and delivery, she had no interest whatever in the premises that she was competent to convey, nor did she acquire any during her life. The only question, therefore, that remains upon the merits is, whether the lease granted by the defendant Byrns as trustee to the defendant Hodges, can be upheld as a proper execution of the authority given to the trustees by the will. The lease is certainly void if it appears upon its face, or was proved upon the trial, that the trustee in making it exceeded his powers; and it is scarcely necessary to add that if the lease from the trustee to Hodges was void, that from Hodges to the appellant must be equally so, unless the alleged absence of fraud on his part is alone sufficient to render it valid. The authority given by the will to the trustees is to make leases of the premises devised, for a term of years not exceeding twenty-one years from the making thereof, as they may deem expedient, so that in every lease so made there shall be reserved "the best and most improved year's rent that can be gotten." And the allegations on the part of the plaintiff are, that the trustee, in making the lease in question, exceeded his authority, and violated his trust, by making the term of twenty-one years for which it is granted, commence in possession on a future day, and by reserving a rent for less than it appears from the evidence on the trial and the Judge at Special Term has found could have been obtained. And if either of these objec-

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tions shall appear to be well taken, it will be our duty to declare that the lease was void as soon as it was executed—void in its creation.

The lease in question purports to have been executed and delivered on the 20th of December, 1849—and grants and demises to the party of the second part, the defendant Hodges, the house and lot now in question, to have and to hold the same from the 1st of May, 1850, for and during the full end and term of twenty-one years, thence next ensuing. The lease by its terms was intended to vest, and if valid would have vested an immediate interest, termed in law an *interesse termini*, in the lessee (1 Inst. 4, 6 b., 2 Crabb's Law of Real Property, §§ 1269, 1300.) But the term which it grants by express terms was not to begin to run, in other words, was not to commence in possession until a future day. Hence, if the words in the power to lease, as granted by the will, "from the making thereof," mean, as they unquestionably do, the making of the lease, and if they necessarily import that the term to be granted must be computed from the execution and delivery of the lease; and if the law is settled, that when a power to lease is confined to leases in possession, a lease to commence in possession on a future day is wholly void; the objection, that the lease in question was void in its creation, and void upon its face, admits of no reply. The cases, however, that were cited by the counsel for the plaintiff, are alone conclusive to show that the necessary import of the words "from the making thereof," is such as has been stated (Vide also Crabb's Real Property, § 1301, 1316, 1359) and that when a power to lease is confined to leases in possession, and not in reversion, a lease to commence in possession on a future day, is wholly void. To the cases cited by the counsel, many might readily be added, but I shall content myself with referring to the leading and celebrated case of *Pugh v. The Duke of Leeds* (Cowper 714) in which all the prior authorities were carefully reviewed, and the whole subject elaborately discussed.

In this case, the power to lease was confined to leases "in possession, and not in reversion;" and the lease in question was for the term of twenty-one years, "from the day of its date." In *Hutts v. Ash*, 2 Salkeld 413, and perhaps in other cases, it had been held, that a lease to commence from its date included

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the day of its date, but when it is to commence in possession from the day of its date, the day is excluded—and in *Pugh v. Leeds*, it was admitted by the counsel, and by the judges, that if this construction must be followed the lease in question could not be sustained, since thus construed, it was a lease to commence on a day subsequent to its execution, and, therefore, void, as not warranted by the power. The only question, therefore, was, whether the court would suffer its judgment to be controlled by the earlier cases, or reject the refined and in truth verbal distinction upon which they proceeded. As might be expected, Lord Mansfield and his brethren rejected the distinction as unreasonable, and his Lordship said, That the word "from" not only in vulgar use, but in strict propriety of language, might be used either in an inclusive or exclusive sense—that in all cases it was to be construed according to the intention of the parties; and that in the case before them it was necessarily used and understood by the parties in a sense that would render their deed effectual. The lease was held to be valid, as not contravening the terms of the power.* I have cited this case not merely as proving the existence of the rule that a lease *in futuro*, when a lease in possession only is authorized, is void, but as illustrating the strictness of its application, for if in *Pugh v. Leeds*, the language of the lease had been such as necessarily to exclude the day of its execution, it is certain that it would have been held to be void, although to commence in possession on the following day; nor is the rule, although, perhaps, too rigidly applied, to be condemned as unreasonable and arbitrary. On the contrary, it has always been regarded, and justly regarded, as necessary to the protection of those who have a present or future interest in the due execution of a leasing power; and hence, Chancellor Kent observes, "that where a power to lease is uncircumscribed it is liable to abuse, and to be carried, even with upright intentions, to an extent prejudicial to the interest of the *cestui que trusts*, or parties in remainder (4. Kent. Com. pp. 106, 107).

The necessary conclusion, from the observations that have

* In 4 Kent's Commentaries there is a valuable note and collection of cases on the general question, whether in computing time from an act or event the day is to be included or excluded, 4 Kent. Com. p. 95, note (b.)—Reporter.

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been made, and the authorities that have been cited, is, that the lease to Hodges, under which the appellant claims, was void in its creation and upon its face, was unauthorized, and, in effect, forbidden by the terms of the will. As Hodges had no title at all, he could pass none to the appellant, even if the latter is to be regarded as a *bond fide* purchaser. He knew that the lease to Hodges was from the trustee under the will. He was bound to inquire into the provisions of the will, and was therefore bound to know that the trustee, in making the lease, had exceeded his powers and violated his duty. It is true that a Court of Equity, in many cases, will aid the defective execution of a power in favor of a *bond fide* purchaser; but assuredly no Court of Equity could grant this aid by reforming an instrument in execution of a power, in a case like the present. No Court of Equity could strike out the 20th of December, 1849, the true date of the execution of the lease in question, and substitute the 1st of May, 1850, so as to make the lease valid upon its face, as a lease in possession. Equity aids the defective execution of a power, in order to carry into effect the true intention of the parties—the intention which, in proper form, they have failed to express; but Equity, under pretence of reforming, never alters an instrument in execution of a power, so as to make it assert a falsehood, by striking out the intention which its words plainly express, and substituting another that they were never meant to convey. (Sugden on Powers, 841–421.)

There is another ground upon which the lease to Hodges must be held to be void, and must have been so pronounced, even had it been valid on its face, by making the term of years which it grants commence in possession from the date of its execution; the lease was, in effect, the grant of a reversion, and was therefore necessarily to commence in possession upon a future day. It appears from the evidence that at the time of the execution of this lease, there was a valid outstanding lease of the premises, which was not to expire until the first of May ensuing. The existence of this lease was a bar to an immediate entry by Hodges. He could not have taken possession until the first of May, and his lease, if operative at all, could have operated only as the grant of a reversion—an effect which, as we have seen, the terms of the will, and the law applicable to those terms, forbid us to give it,

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Another objection was stated to the validity of the lease in question, which we think cannot be sustained. It contains a clause declaring that it may be continued for two further terms of 21 years each, upon the same terms, at the option of the lessee; thus placing it in his power to convert the lease into the grant of a term of 63, instead of 21 years. But, although this clause, as exceeding the authority of the trustee, was unquestionably void, it does not follow, nor can we say, that it rendered void the prior demise for 21 years. It is an established doctrine in England, that, where a lease under a power is granted for a longer term than is authorized by the power, although it is void at law, it is good in equity for a term of years corresponding with the power, and is void only for the excess. (Sugden on Powers, 545; 4 Kent. Com. p. 107, note (d), and cases there cited.) According to this doctrine, had the lease in question been granted, even for an absolute, instead of an optional term of 63 years, we could not for that reason have declared it to be void, but, as a Court of Equity, must have sustained its validity as a term for 21 years, by cutting off the excess.

We proceed to the next main objection to the validity of the lease, to which we are also of opinion that no satisfactory answer has been given, namely, that the rent reserved in the lease, was not the best which it was the duty of the trustee to obtain, but was far less than, it was proved upon the trial, he could have obtained. Upon this question, a very few remarks will suffice to explain our views. It was proved upon the trial, by the witnesses for the plaintiff, and their testimony was uncontradicted, that, at the time of the execution of the lease in question, a rent of more than double that reserved in the lease could with certainty have been obtained. Upon this evidence, it was found by the judge at special term that such substantially was the fact; and this finding we must hold to be conclusive. As to the facts, therefore, upon which the question depends, there is, in truth, no doubt, nor can we perceive that any has been raised in respect to the law. The counsel for the appellant was certainly mistaken in supposing, that, where the duty of reserving the best rent that he could obtain is imposed upon the trustee of a power, nothing more than good faith in the discharge of the duty is required of him; so that, unless fraud, which is never to be presumed, is

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actually proved, a lease granted by him is to be sustained as valid, however inadequate the rent reserved, and however clear the proof that a higher rent might readily have been obtained. We think, on the contrary, that the duty thus imposed upon a trustee, as plainly requires the exercise of reasonable diligence in its discharge as that of good faith; so that when it clearly appears that the rent reserved in a lease granted by him was plainly inadequate, when the lease was executed, and that a higher, in the exercise of due diligence, could have been obtained, the neglect of the trustee may be justly regarded as a breach of his duty and of his trust, sufficient to invalidate his act. In the case before us, we think that the proof is conclusive to show that a rent largely exceeding that reserved in the lease, with reasonable diligence, might have been obtained, and that the gross negligence of the trustee, and his manifest disregard of the provisions of the will, in not obtaining a more adequate rent, are sufficient grounds, even if we reject the imputation of fraud, for adjudging the lease in question to have been void as soon as it was executed.

We have now fully considered the case upon its merits, and it is only a technical objection to the maintenance of the action in its present form, that remains to be noticed. The objection is, that the present trustee, Wyckoff, was alone competent to bring an action for setting aside the leases in question, and, it is contended that, upon the sole ground that he is not the plaintiff, if all other objections are overruled, the judgment appealed from should be reversed, and the complaint be dismissed.

It was not denied by the counsel for the appellant that it has long been an established rule in Chancery, as was abundantly proved by the cases cited for the plaintiff, that when a trustee refuses to commence an action, that the interests of the *cestui que trust* require should be brought, the latter, upon the ground of that refusal, may commence and prosecute the action in his own name, making the trustee a party defendant; but it was insisted by the counsel that the Rev. Stat. have abolished this rule, since, by vesting in every case of an express trust, the whole estate, legal and equitable, in the trustee, they have made him alone competent to bring an action for its recovery or protection (1 R. S. p. 729, § 60); but it seems to have escaped entirely the attention of the counsel, that the words in the section of the

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R. S., to which he referred us, which vest the whole estate, in law and in equity, in the trustees, are followed by the words, "subject only to the execution of the trust," and that the same section, for the purpose of removing all doubt as to the mode of compelling the execution of the trust, also declares that, although the persons for whose benefit the trust is created, take no estate or interest in the lands, they "may enforce the performance of the trust in equity;" which can only mean "enforce its performance" by a suit in their own names against the trustee. The present action, in our opinion, is precisely of this character, for its sole object, so far as relief is sought against the trustee, is "to enforce the performance of his trust," by requiring him to make a new and proper lease, and it is brought by a person for whose benefit the trust was created. When it is brought to the knowledge of a trustee having a power to lease, that a lease by a former trustee, in which a very insufficient rent is reserved, is void upon its face, it is his duty, in the faithful discharge of his trust, disregarding the existence of the former lease, to make a new lease, in which a full and sufficient rent shall be reserved; and to enable him to do this, it is not necessary that the former lease, if void in law, should be set aside,—the new lease, if a valid execution of the power, displaces and extinguishes the former, and takes immediate effect (*Miller v. Mainwaring*, Cro. Car. 897, Crabb's Law of Real Property, § 1,800). In this case the relief sought by the complaint is, that the trustee may be directed to make a new lease in conformity to the provisions of the will, and this direction is found in the judgment. The complaint therefore asks that the trustee may be compelled to perform his trust, and the judgment decrees its performance, at the suit of a person for whose benefit the trust was created. We cannot doubt that the suit was properly brought, and the proper judgment rendered.

To conclude, our decision is, that the finding of facts and the conclusions of law in the judgment appealed from, are in all respects correct, and the relief granted exactly that which the facts and the law of the case entitled the plaintiff to demand.

The judgment must therefore be affirmed with costs.

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**CARRINGTON & DOUGHERTY v. THE COMMERCIAL FIRE AND
MARINE INSURANCE COMPANY OF JERSEY CITY.**

The American Mutual Insurance Company of Amsterdam, having insured the plaintiffs against loss or damage by fire, and having issued some nineteen other policies insuring the like number of other persons or firms, its agent, while such policies were in force, entered into an agreement with the defendants, The Commercial Fire and Marine Insurance Company, of Jersey City, by which agreement the latter "reinsure the American Mutual Insurance Company of Amsterdam, upon the following policies issued by them," (specifying the said twenty policies,) "loss, if any, payable to the assured upon the same terms and conditions, and at same time, as contained in the original policies. Reinsured from November 30th, 1854, 12 o'clock, at noon, to the expiration of the policy."

Held, that such agreement was a contract of reinsurance, and that the plaintiffs could not sue upon it. That any moneys recoverable under it, for a breach of it, would be the property and assets of the Company so reinsured. That the plaintiffs had no right to such moneys, nor any lien upon them to satisfy a loss under the policy issued to them, notwithstanding the Company which insured them had failed before such loss occurred. That the word "assured" in such agreement meant the Company re-insured, and not the assured in the original policies, and that it could not be shown by parol that it was the understanding between the defendant and such agent at the time the agreement was executed that the word, "assured," as used therein, was intended to apply to, and designate the persons insured by the original policies.

(Before DUNE and BOSWORTH, J.J.)

Argued March 2nd; decided April 25, 1857

THIS action was tried before Chief Justice Oakley, and a jury, on the 9th of December, 1856. The defendants moved for a nonsuit, when the evidence was closed. The court directed a verdict for the plaintiffs, for \$2,203.44, the amount claimed, subject to the opinion of the court, at general term, upon the questions of law, arising in the case, with liberty to the court at general term, to dismiss the complaint, and reserved the right, to either party, to turn the case into a bill of exceptions.

The complaint set forth the contract of insurance between the plaintiffs, and the Amsterdam Company, and the terms of the policy. It then alleged, "that on or about the thirtieth day of November, in the year 1854, the said defendants, at the request of the said American Mutual Insurance Company, and for a valu-

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able consideration to them in hand paid by the said company, by an instrument in writing made by the said defendants, and by them delivered to the said company, agreed in substance to assume, and did thereby assume the liabilities, contracts, and agreements of the said American Mutual Insurance Company in the said policy created and contained, and promised and agreed to pay the loss, if any, under the said policy to the plaintiffs, upon the same terms and conditions and at the same time as were stipulated for in the said policy, and did then and thereby become liable to the plaintiffs for any loss happening under the said policy."

It then alleged a loss by fire, the fact of damage exceeding the sum insured, notice to the defendants and service on them of the preliminary proofs, a refusal to pay, and prayed judgment. The answer put at issue the allegations of the complaint above quoted. On the trial, the following facts were established, and proceedings were had.

The American Mutual Insurance Company, by a policy dated the 10th of June, 1854, and numbered, 4755, insured the plaintiffs against loss or damage by fire, to the amount of \$2,500. This company was located at Amsterdam, Montgomery County, New York, and had an agent in the city of New York.

This Company had issued other policies to other parties, amounting in the aggregate, including the one held by the plaintiffs, to \$26,680.

These policies being in force, their agent in New York, on the 30th of November, 1854, effected a reinsurance with the defendants, by an instrument in writing, in these words:

"AGREEMENT OF REINSURANCE.

No. 754.

\$26,680.

The Commercial Fire and Marine Insurance Company of Jersey City, for and in consideration of the premiums set opposite to each memorandum of policy, the receipt whereof is hereby acknowledged, do, by this instrument, reinsure the American Mutual Insurance Company of Amsterdam, upon the following policies issued by them, loss, if any, payable to the assured, upon the same terms, and conditions, and at same time, as are contained in the original policies. Reinsured from Nov. 30, 1854, 12 o'clock at noon, to the expiration of the policy, viz—

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(The memorandum, among other descriptions of policies, read thus):

No. 4755	Carrington & Dougherty,	59 Henry Street,	2500	1½ P	16.48	1855. June 10th,
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Jersey City, N. J. Nov. 30th, 1854.

J. M. CHAPMAN, *President*."

JOHN L. CREW, *Secretary*."

On the 19th of March, 1855, the property insured by the original policy, was destroyed by fire: The plaintiffs prepared preliminary proofs of the loss, and served them on the defendants. Proof of the loss was waived, at the trial.

By an order of the Supreme Court, dated the 27th of November, 1854, upon notice to, and the written consent of the American Mutual Insurance Company, the latter Company was declared to be insolvent, and that Company, and every of its agents and officers were enjoined and restrained, "from exercising any of its corporate rights, privileges or franchises," and the property and effects of the corporation were sequestered, and a receiver ordered to be appointed, and a referee was designated to appoint a receiver. Such order also declared that "the said Corporation is to continue in existence, so far only as may be necessary, to enable the receiver to be appointed as above directed, to collect the debts and demands, and distribute the property and effects, belonging to said corporation, in the names thereof, and for no other purpose whatever, and that for all other purposes, and when the above specified objects shall be attained, the said corporation be, and is hereby dissolved."

The appointment of receiver was perfected on the 2d of December, 1854.

The agent, in New York, was wholly ignorant of the order of the 27th of November, 1854, at the time he obtained the agreement of reinsurance. He paid the reinsurance premium out of his own funds.

The plaintiffs offered in evidence a letter from the receiver to the defendants, dated the 10th of July, 1855, consenting that they settle and adjust, with the plaintiffs, the loss they had sustained,

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and to relinquish all claims, as receiver, ("i. e. if he should have any)."

This evidence was excluded.

The plaintiffs also offered to show, that it was understood between the witness and the defendants at the time of the execution of the agreement of reinsurance, that the word, "assured," used in said agreement, was intended to apply to the persons named in the list therein contained.

This evidence was also excluded. The plaintiffs excepted to each of these decisions.

The testimony being closed, the defendants moved for a non-suit on the grounds,

1. That on the 30th day of November, 1854, the American Mutual Insurance Company of Amsterdam were dissolved by order of the Supreme Court, and were incapable in law of contracting.

2. That the plaintiffs in this action, were not the proper parties to sue.

3. That the court had no jurisdiction of the subject of the action.

The court ordered a verdict in favor of the plaintiffs, subject, &c., as before stated, and liberty was reserved, in the case, to either party to turn it into a bill of exceptions.

H. Ketchum, for plaintiffs.

E. P. Cowles, for defendants.

BY THE COURT. BOSWORTH, J.—By the terms of the contract of November 30, 1854, the defendants "re-insure the American Mutual Insurance Company, of Amsterdam, upon the following policies issued by them," (a detailed statement of which policies is embodied in and forms part of the contract,) "loss, if any, payable to the assured upon the same terms and conditions, and at same time, as contained in the original policies. Re-insured, from November 30, 1854, twelve o'clock at noon, to the expiration of the policy."

If the word "assured," as used in this contract, means the party re-insured, the present plaintiffs have no interest in the contract, and no right to maintain an action upon it.

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Assuming the word "assured," as there used, to have that meaning, and the contract to be valid, the plaintiffs must look to the American Mutual Insurance Company alone, and to its assets which have and may come to the hands of its receiver, for indemnity.

They have no lien upon the contract in question, nor right to the moneys which the defendants may pay under it. Such moneys, when paid, will form part of the assets of the company which insured them, and the plaintiffs must be paid *pro rata* with its other creditors.

These propositions are so well settled, that it is unnecessary to do more than refer to the cases which have determined them: *Hone et al., Receivers, &c., v. The Mu. Safety Ins. Co.*, 1 Sand. 187; affirmed by the Court of Appeals, 2 Coms. 285; 1 Arnould on Ins. 288, § 119; Parsons on Mercantile Law, 514, § iv.

The contract of the 30th of November, according to the view taken of it by the complaint, is one, by which the defendants "agreed, in substance, to assume, and did thereby assume, the liabilities, contracts, and agreements of the said American Mutual Insurance Company, in the said policy created and contained; and promised and agreed to pay the loss, if any, under the said policy, to the plaintiffs," &c.

The complaint, however, also avers, that on or about the 30th of July, 1855, the said American Insurance Company released and assigned to the said plaintiffs all the claim and demand of the said American Insurance Company against the said defendants, by reason of the premises, of which the said defendants had notice: These allegations are put in issue by the answer.

There is no evidence in support of the fact of such an assignment, and there could not well be any, as such corporation had been dissolved long prior to the 30th of July, 1855.

If the word "assured" does not mean the party "re-insured," and that party only, then it includes and embraces not only the plaintiffs, but also nineteen other individuals and firms. By the contract of re-insurance, the defendants took upon themselves the risks, which the corporation re-insured, had incurred, by issuing twenty separate and distinct policies.

The Chief-Justice must have supposed that the word "assured," as used in the contract in question, was a word of clear

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import and obvious application, and, for that reason, excluded evidence offered to show, that by it the defendants and the agent of the other contracting party, understood and intended it to apply to the persons named as the assured in the original policies. The contract is one of re-insurance.

The risks incurred by the American Mutual Insurance Company, by the particular policies which it had previously issued, were the subjects of the contract. By the very terms of the contract, the latter Company were re-insured "upon the following policies issued by them," and were properly and truly named in it, as the "assured." They were as truly, in fact and in law, the "assured," within the meaning of that word, as used in that contract, as were the plaintiffs, in the policy issued to them by the American Mutual Insurance Company.

To treat it as made for the benefit of the original assured, and providing that the loss, if any, should be paid to them, so as to give them a right to recover the amount of the loss, and retain the money for their own indemnity, is in effect making it a double insurance, rather than a contract of re-insurance.

If a contract of re-insurance, the fruits of the contract belong solely to the party re-insured, and must be distributed by the receiver, as part of its general assets, and in the same manner, as the other assets of the insolvent corporation.

If it is a contract, by virtue of which the original assured may recover in their own names, and retain for their exclusive indemnity, the moneys which the defendants are liable to pay, then it possesses none of the elements of a contract of re-insurance.

To give it such a construction, is not only varying its clear legal import, but, in our opinion, its express terms.

Any parol evidence offered to produce that result, should be excluded; 1 Sand. S. C. R. 151, 152.

In the case of *Hone et al., Receivers, v. The Mu. Safety Ins. Co.*, 1 Sand. 188-9, the contract of re-insurance "was the usual printed form of a fire policy, with no change, except the insertion in writing of the prefix *re*, before the word *insure*, in the commencement of the instrument." By it, citing its words, "the said company do hereby promise and agree to make good unto the said insured, their executors, administrators and assigns," &c.

That contract, being by its terms one of re-insurance, the

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Court refused to receive parol evidence, varying its legal import as such.

We think it quite clear, that even assuming the contract to be valid, it is one in which the plaintiffs have no interest, and therefore one, upon which no action can be maintained, in their names, as plaintiffs.

This presents a case of an entire failure to prove, in substance or legal effect, the averments contained in the complaint, as the basis of a cause of action in favor of the present plaintiffs. Code, § 171; *Mann v. Morewood et al.*, 5 Sand. 557.

These views, if sound, render it unnecessary to determine the question whether the contract is obligatory upon the defendants.

The contract by its terms, and in legal effect, is one between two corporations. One of them, the party re-insured, was disabled from contracting, by an order of the Supreme Court, made prior to the date of the contract. That order enjoined and restrained that corporation, and each and every of its officers "from exercising any of its corporate franchises," and sequestrated its effects, and continued it "in existence so far only as" might ("may") be necessary to enable the receiver to be appointed," &c., "and for no other purpose whatever," and declared that for all other purposes, "when the above specified objects shall be attained, the said corporation be, and is hereby dissolved."

Whether the receiver, at his election, with or without an order of the Court, is competent to adopt and ratify the contract, and enforce it against the defendants, is a question which does not now arise.

We think it quite evident, that neither the Corporation, nor any of its officers, subsequent to the order of the 27th of November, could make any contract, which would bind the Corporation as such, or on which any claim could be established, creating a right to have it satisfied out of its assets.

The contract was made by its agent, and the defendants, upon a mutual mistake, as to the continuing capacity of the re-insured Corporation to make a contract. Whether the defendants, after having received the whole consideration of the contract, and continuing to retain it, can be made liable to any party by reason of, and upon the contract, we are not disposed to discuss, having come to the conclusion, that the plaintiffs have given no

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evidence in support of the allegations, that by the terms of the contract, the loss, if any, was to be paid to them, and that all the interest of the American Mutual Insurance Company in it, as a competent and actual contracting party, had been assigned to the plaintiffs. The verdict must be set aside, and a judgment entered dismissing the complaint—under the stipulation, giving that power to the Court, and contained in the printed case.

WM. H. MILLS v. THOMAS CARNLY, Sheriff

A debtor having sold and transferred property to his creditor in payment of a debt, such property cannot be seized on an execution against such debtor, merely because the debt so paid was usurious. After a voluntary payment of such a debt by the debtor, only the usurious excess can be recovered back, and that can only be done within a year after such payment, when the action is brought by such debtor or his personal representatives.

A power of attorney which, by its terms, authorizes the attorney "to buy and sell real estate and personal property, and to collect rents, money, and debts, and to do every act and thing necessarily pertaining thereto," and given as the principal was about to leave the State temporarily, and accompanied with a deposit, by the principal, of \$1,800 in money with the agent, does not authorize the agent to purchase a Merchant Tailor's establishment, and give promissory notes, in the name of the principal, for the contract price.

Accordingly, when such an agent, assuming to act in the name of his principal, made such a purchase, amounting to \$4,123.16, and took a transfer of the property to his principal, and paid for it by cancelling a debt for \$966, which the vendor owed to such agent, and by giving four notes for \$789.29 each, in the name of his principal, at 3, 6, 9, and 12 months, the agent being irresponsible, and not informing his principal of the fact of such purchase, and subsequently the property was seized on an execution against such vendor, and a suit was brought by such agent, in the name of his principal, against the Sheriff, for such taking of the property, and the Judge at the trial charged the Jury that, the agent had authority, under such a power, to make such a purchase, and to agree to pay the contract price in instalments, and therefore could give notes in the name of his principal, and that such notes would be valid, and that, in so far as the validity of the transfer depended upon the fact of there being a sufficient consideration to uphold it, the consideration in this case was sufficient, *held*, that the charge was erroneous, and that, on such a state of facts, there was no sufficient consideration to uphold the sale, as against the creditors of the vendor; and that the notes given by the attorney were not obligatory upon his principal.

On the facts of this case, as established by the evidence given at the trial, it was

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also held, that the inference, that the purchase and sale were made, and immediately followed by an assignment, by the vendor, of all his property to such agent, with a view and with the intent, by means thereof, to effect a favorable compromise with the creditors of such vendor, and to speculate, out of such a result; and that the jury would have so found but for the erroneous instruction as to the sufficiency of the consideration, was a just one.

Any evidence which is material to the issue, though given on the cross-examination of a witness, does not conclude the party cross-examining. The matters thus testified to are not to be treated as collateral matters, in respect to which a witness cannot be contradicted. It is error, to preclude a party from showing the truth of the case, in respect to such matters, notwithstanding the evidence sought to be contradicted was elicited by his cross-examination.

Judgment reversed, and new trial ordered.

(Before DUMR, BOSWORTH, and SLOSSON, J.J.)

Argued March 9th, and decided April 25th, 1857.

THIS action comes before the Court upon an appeal by the defendant, from a judgment, entered on a verdict, rendered at a trial had before Mr. JUSTICE BOSWORTH and a Jury, on the 10th of March, 1858.

The action was brought to recover the value of personal property, taken by the defendant from the possession of the plaintiff, as was alleged, on the 16th of June, 1852.

The defendant justified the taking, on the allegations that, at the time of such taking, he was a Sheriff, and the property then belonged to one Wm. McBryde, and that it was taken on executions against the latter, by the defendant, as such Sheriff.

The theory of the plaintiff's right to recover, was, that one G. T. Terhune was the agent of the plaintiff, and, as such, had loaned money to McBryde, to the amount of \$966, and, as such agent, bought the property in question on the 17th of May, 1851, from McBryde, and paid for it, to the amount of \$966, by cancelling the debt for that amount, and by giving, as such agent, the plaintiff's promissory notes for the balance of the contract price, at 3, 6, 9, and 12 months.

The theory of the defence was, that Terhune had no authority, as agent of Mills, to make the purchase or give the notes, and that the purchase by him, and transfer of the goods to Mills, were made with intent to hinder, delay, and defraud the creditors of McBryde.

The power of attorney, from Mills to Terhune, was dated the 21st of April, 1851, and in terms authorized Terhune, "to buy

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and sell real estate and personal property, and to collect rents, money, and debts, and to do every act and thing necessarily pertaining thereto," and granted to the "said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as" Mills "could do, if personally present"—

In April or May, 1851, Mills went to Europe, and left with Terhune \$1,800, and, in the subsequent September, remitted to him £10: he left with him no other funds: this was the only purchase which Terhune made, as agent of Mills, and, down to the time of this trial, he had not advised Mills of this transaction: the latter was a man of property.

Terhune discounted notes for, and lent money to McBryde, not disclosing that he was not using his own money.

McBryde, who had a merchant tailor's establishment, becoming embarrassed, sold to Mills, (Terhune making the purchase as Mills's agent), his stock in trade, inventoried at \$5,497.44, at a discount of 25 per cent. from that price. He transferred the property in satisfaction of his debt, for moneys loaned and advanced to him by Terhune being, \$986.00
and for four notes, each being for the sum of \$789.29— 3,157.16

\$4,123.16

Each note was payable to the order of McBryde, and signed,
"WM. H. MILLS,
G. T. TERHUNE, Agent."

Terhune took possession of the establishment upon purchasing the same, and commenced and continued the business in the name of Mills, until the property was seized and removed by the Sheriff.

McBryde, on the day of this sale, assigned all his property to Terhune, in trust for the benefit of his creditors. The assigned property consisted of his book accounts, and choses in action, and of these four notes.

The defendant offered to show that the loans made by Terhune to McBryde, and constituting, with interest, the debt of

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\$966, were made at a usurious rate. The judge rejected the evidence, and the defendant excepted to the decision.

McBryde was examined on behalf of the defendant, and gave evidence tending to show that the sale to Mills, and the assignment to Terhune, were, in fact and in intent, a single transaction, and were made to place his property beyond the reach of his creditors, and with a view, through Terhune, to compromise with them, on favorable terms. He swore that one Thomas Ball was, at that time, his partner in the business, and that the sale and assignment were made without the knowledge or consent of Ball.

The judge, against the objection and exception of the defendant, permitted Ball to testify that he was not a partner of McBryde, and that the latter and Terhune informed him of the sale, on the day it was made, and exhibited to him the bill of sale, when the three were together.

Evidence was given by the defendant to impeach, and by the plaintiff to show the good faith of the sale, and on the part of the defendant to establish that the sale and assignment were, in fact, dependent parts of one transaction, and on the part of the plaintiff that they were in truth and in purpose disconnected and independent transactions.

The judge charged the jury, among other things, that so far as the result depended on the fact of a sufficient consideration, the debt of \$966, if it existed, and the four notes were a good and sufficient consideration, if there was no intent to defraud.

That the power of attorney from Mills to Terhune, authorized the latter to make the purchase, and contract to pay, in instalments, which would bind Mills, and to give notes in the name of Mills, which would be valid and collectable of the latter.

To this part of the charge the defendant excepted.

C. O'Conor and A. J. Vanderpoel, for appellant.

James T. Brady and L. B. Reed, Jr., for respondent.

BY THE COURT. BOSWORTH, J.—McBryde having conveyed property to Mills, in satisfaction of the debt for \$966, it cannot be seized by execution, at the suit of a creditor of McBryde, on the mere ground that such debt was infected with usury.—2 Hill,

522, *Dix v. Van Wyck*, and cases there cited; *Sands v. Church*, 2 Seld. 347.

The borrower having paid the debt with usurious interest, only the usurious excess can be recovered back.

That may be recovered by the borrower, or his personal representatives, within one year after such payment. If no such suit be brought within the year, the sum may be sued for and recovered within three years thereafter, by any overseer of the poor of the town, or any county superintendant of the poor of the county, in which the payment may have been made.—1 R. S. 772, §§ 3 & 4.

McBryde testified, that Francis Ball was his partner, and was not informed of the sale and assignment, and continued under the impression that the business was going on for his benefit.

This was very material evidence upon the question of the intent of the parties to that transaction. Although the evidence was given on his cross-examination, that fact did not estop the plaintiff from proving, that Ball had no interest in the business, and knew of the sale at the time, and subsequently labored under an employment by Mills.

If that evidence was not responsive to questions put to him on his cross-examination, but was volunteered, I have no doubt it would have been error to exclude testimony showing it to be untrue. The evidence related to matters which were not collateral, but were pertinent to the issue. In respect to such matters, to exclude evidence that a witness has made statements in conflict with his testimony given at the trial, is an error, for which a new trial will be granted. His evidence may be contradicted by showing the facts to be different from what he testifies them to be.—*Patchin v. The Astor Mutual Insurance Company*, 8 Kern, 268.

The serious difficulties which the case presents, arise out of exceptions to the parts of the charge, relating to the sufficiency of the consideration, and the extent of the authority conferred on Terhune, by the power of attorney from Mills.

It is quite clear that the power did not authorize Terhune, to establish and prosecute the business of a merchant tailor, in the name, and at the risk of Mills, nor to purchase a subsisting establishment with a view to the continuance of the business.

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The purchase, in question, was one of that character, and immediately after it was made, Terhune commenced the prosecution of it as it had been previously conducted, and continued to so prosecute it, until it was broken up by the Sheriff, except that he controlled it himself, and acted throughout in the name of Mills.

The property was purchased at the agreed price of \$4123 $\frac{1}{4}$. For \$3157 $\frac{1}{4}$ of this price, he gave negotiable notes in the name of Mills, without any authority for so doing, except such as the terms of the power of attorney confer.

If the notes are not obligatory upon Mills, then McBryde did not receive anything for the property, except a discharge from a debt amounting to \$966.

The responsibility of Terhune does not appear to be such, that a sale to him, on credit, for his notes, of the same amounts and maturing at the same time would be upheld.

The better opinion would seem to be, that as a general rule, an agent, employed to make purchases for his principal, has no authority to bind him, by a negotiable promissory note, or bill of exchange, even though authorized to buy on credit.

On such contracts, the principal would be liable, to the vendors only: In an action by them, or their assignee of such a contract, the consideration would be open to inquiry; all the circumstances attending the sale might be shown; and all payments and offsets adjusted and enforced. Proof of all these matters would be excluded, in an action by a *bond fide* endorsee of a negotiable note, or acceptance.

The assumption and exercise of such a power is not necessary to enable Terhune to execute fully, the express powers conferred by the instrument which appointed him an agent.

Taber v. Cannon et al., 8 Met. 456-458. *Webber v. Williams College*, 28d Pick. 302. *Rossiter v. Rossiter*, 8 Wend. 494. *Paige v. Stone*, 10 Metc. 160 and 167-8-9. *Parsons' Mercantile Law*, p. 142 and (n. 2.)

As to the power of an agent to bind his principal by a purchase made on credit, see *Boston Iron Co. v. Hale*, 8 N. H. 363.

We do not intend to intimate, that when the agency by its terms relates to a business, which, in order to conduct it, as it is

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common to conduct such a business, requires authority to bind the principal by negotiable paper, an agent may not so bind the principal, even though the letter of attorney does not, in express terms, confer such a power.

But it is unnecessary to pass upon that question, because it is not before us. No such ground can be taken in this case.

It cannot be gathered from the power of attorney itself, or be seen from the light shed upon it by any cotemporaneous facts which have been proved, that the principal intended to do more than authorize the attorney to make purchases with the money intrusted to him, and to sell any property he might so purchase.

If Mills, when he left for Europe, was a large owner of real estate, he would probably be surprised, on his return, to learn that Terhune had sold and conveyed it, by virtue of this power of attorney.

Mills has not ratified this transaction. As the evidence stands, the only conclusion admissible is, that he had not even heard of it at the time of the trial.

We think there was no evidence of a consideration, under the peculiar facts and circumstances of this transaction, sufficient to uphold the sale, so far as its validity, and the good faith of the transaction depend on that fact alone.

The case is one, the leading features of which present strong badges of fraud. Terhune had no means with which to pay the notes, nor the power, as agent of Mills, to procure them. At the time of the trial, he had not advised Mills of the transaction. Three of the notes had then matured. Mills was not liable as maker of them, without having ratified and adopted the transaction, and that he had not been asked to do. Terhune had not sufficient pecuniary ability to enable him to pay the notes himself.

The facts tend very strongly to the conclusion, that the object was to obtain payment of the \$966, and make a speculation, by vesting the title in Mills, and coercing a compromise with McBryde's creditors, upon such terms, that profit, as well as the payment of the \$966, might be secured.

Selling the goods, on a credit of three, six, nine, and twelve months, even if the notes were valid, was necessarily delaying the creditors of McBryde, until the maturity of the notes, unless

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the assignee should convert the notes into money by selling them. An assignment, with authority to sell on such terms of credit, would be void.

A sale upon such terms by an embarrassed debtor, with an understanding at the time, that the debtor should immediately assign the notes, rather than the goods sold, for the benefit of creditors, and that the purchaser should be the assignee, and a contemporaneous execution of that understanding, would present a case falling within the mischief of the rule.

The assignment was not made to the nominal purchaser, it is true, but it was made to all that was visible of him, viz. his assumed agent in the purchase, and subsequent possession and disposition of the property bought.

The jury were charged, that "if the sale and assignment were, in the intent and purpose of Terhune and McBryde, a single transaction, if the purpose was to keep the control and use of the goods while the four notes were maturing, and to postpone or interfere with the power of creditors, to coerce the conversion and application, to the payment of their debts, of the property for which the notes were given, then the sale was made with intent to hinder, delay, and defraud creditors, and was void, and entitles the defendant to your verdict."

We cannot avoid thinking that, under this part of the charge, the jury would have found a verdict for the defendant, had they not been erroneously instructed in relation to the consideration paid for the goods, and the validity of the notes given by Terhune in the name of Mills.

The judgment appealed from must be reversed, and a new trial granted, with costs to abide the event.

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An existing valid cause of action, in favor of the plaintiff, against the defendant, is not discharged or waived by an offer of the plaintiff to permit the defendant "to use" the amount due to the plaintiff thereon, if it will enable the defendant "to carry a trade through," made between the defendant and a third person, without

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other assistance from such third person, though such cause of action accrued and the amount, the use of which is so offered, is due, for services of the plaintiff, as broker, in negotiating the trade alluded to in such offer.

The acceptance of such offer by a letter which states in substance that, the defendant on consummating the trade, will keep back a part of the property in which, by the terms of the trade, payment by him to such third person was to be made, "to supply any deficiency," in connection with such offer, imports that the offer was an offer of the use of the amount, due from the defendant to the plaintiff, temporarily and not a gift or waiver of it, and that it was not made to induce the defendant to modify his contract with such person, and submit to terms to which he might not otherwise assent, on condition of being exonerated from such claim of the plaintiff.

Judgment for plaintiff on the verdict.

(Before DUER, BOSWORTH, and SLOSSON, J.J.)

Heard, March 11; decided, April 25, 1857.

THIS action comes before the Court, at General Term, on a verdict for the plaintiff, subject to the opinion of the Court. The question of law arising at the trial was as to the legal effect of the evidence on the part of the defendant to show that, the plaintiff had given up, or waived commissions due him as broker, for effecting a purchase for the defendant of certain real estate from one John Carr, which the latter was to sell and convey, subject only to a mortgage for \$5000, and for which property the defendant was to pay in jewelry and goods. The property was, at the time, encumbered with taxes to the amount of some \$700, including arrears of interest on the mortgage, which Carr was to extinguish, and his inability to raise money to pay them, seemed likely to prevent a consummation of the contract between him and the defendant, or to cause delay in carrying it into effect. The action was tried before Mr. Justice Duer and a jury, in June, 1856. No question arises on the pleadings. The whole evidence given and proceedings had at the trial are as follows:

The plaintiff, to maintain the issue on his part, called as a witness:

J. R. BRAIN—who being sworn, testified as follows: I know the parties, plaintiff and defendant. The plaintiff is a real estate broker. The defendant is a merchant doing business in New York, and residing in Brooklyn. In the month of November, 1855, the defendant employed the plaintiff to purchase for him, from John Carr, certain houses and real estate situated in Brook-

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lyn. The purchase was made by the plaintiff for the sum of \$9,000, and the property was conveyed to the defendant. The usual commission of the broker on the purchase or sale of real estate, is one per cent. on the amount for which the property is sold.

Being cross-examined, he testified as follows:—The sale was not effected until January 1856. The delay was caused by Carr's failure to pay off some incumbrances on the property sold by him. It depends upon the sale, or the agreement of the parties, who pays the broker's commission—sometimes both parties pay him.

The plaintiff's counsel having rested his case, the defendant's counsel put in evidence the following correspondence between the parties :

MR. A. BINGHAM :

My Dear Sir :—If the amount of my commission (\$90) on the transaction between you and Carr will enable you to carry the trade through without other assistance from Carr, I am willing to allow you to use the same in that manner, as I fear that Carr finds it impossible to raise the money, and I will be happy to hear your decision by the bearer.

G. M. MIRRIELEEES.

Sal'y, Jan'y 12.

G. M. MIRRIELEEES, Esq. :

Dear Sir :—The appropriation of your commission with what aid I may otherwise obtain, I think will enable me to consummate the matter. I will give it my attention on Monday, and in the meantime if you see Carr, hurry him up. Of course I shall keep back a portion of the jewelry to supply any deficiency.

A. BINGHAM.

Jan'y 12, 1856.

The counsel for the defendant then rested, and thereupon the plaintiff's counsel recalled the witness

J. R. Brain,—who testified as follows: The property sold by Carr to the defendant was subject to a mortgage for \$5,000, and there was also due for arrears of interest, and for taxes and assessments, about \$700. Carr agreed to pay off this \$700, and

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the property was then to be conveyed to defendant, subject to the mortgage. Carr was to be paid in jewelry and goods.

Being cross-examined, he testified as follows; It was Carr's neglect to pay off this \$700 which caused the delay from November, 1855, to January, 1856. The defendant finally paid off the interest and taxes himself.

The plaintiff's counsel having again rested, the counsel for the defendant requested the Court to charge the jury that the plaintiff had waived and given up his right to commission or compensation as against the defendant in order to effect the sale, and that without such waiver the sale would not have been effected. But the Court refused so to charge the jury, to which the counsel for the defendant excepted.

The Court directed the jury to find a verdict for the plaintiff, subject to the opinion of the Court at General Term, as to the construction of the correspondence between the parties, and the jury thereupon gave a verdict for the plaintiff for the sum of \$93.50, and the Court directed that judgment in this cause be stayed until the decision of the General Term upon a case to be made by the plaintiff, and that the plaintiff should apply to the General Term for judgment herein.

J. H. Hart, for plaintiff, moved for judgment on the verdict, and insisted that—The ground of waiver taken at the trial, is not set up in the answer; and even if it were, it is submitted that the plaintiff only waived the payment of the \$90 for such time as would enable the defendant, by the "use" of that sum, to complete the purchase of the property; he offered the "use" of the \$90, and the defendant accepted the offer, declaring, at the same time, the means by which he would secure his own indemnity for the extra advances he was about to make in order to obtain the property he was about to purchase.

Hopper and Howland, for defendants, relied on the following point:—The point upon which defendant relies, is raised by the exception to the refusal of the Court to charge the jury as requested; viz.: that the plaintiff, in order to effect a sale, and in consideration that the defendant would pay off the incumbrances himself, offered to give up his commission from the

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defendant as purchaser, to enable him so to do, which offer was accepted, and the sale completed.

BY THE COURT. BOSWORTH, J.—The charge which the defendant's counsel requested the court to give to the jury, and the only point made by him in opposition to the plaintiff's motion for judgment on the verdict, concede the right of the plaintiff to recover, unless the evidence proves that, the plaintiff waived and gave up his right to commissions against the defendant, and that by reason of, and in consideration of such waiver, the defendant completed his purchase on terms with which he was under no obligation to comply.

Whether such proof was given depends, mainly, upon the true construction of the two notes or letters of January 12, 1856. In construing them, we start with the fact conceded that, the plaintiff had earned his commissions, and that they amounted to \$90. It must be borne in mind also, that the only obstacle to a completion of the contract was the difficulty which Carr experienced in raising money sufficient to pay the taxes and assessments, which were a lien on the property, and the arrears of interest upon the \$5,000 mortgage, subject to which, and to which alone, the property was to be conveyed to the defendant. Hence, if the contract between Carr and the defendant was to be fully executed, it might be necessary for the latter to pay some money, instead of paying, wholly, in jewelry and goods. That he might be indisposed to advance, in addition to paying to the plaintiff presently the commissions due to him.

In that condition of things, the plaintiff offered to allow the defendant "to use" the amount to be paid to him, if that would enable the defendant "to carry the trade through without other assistance from Carr." It was not an offer to relinquish the commissions, and waive all claim to be compensated for the services rendered. The defendant's reply shows, that he must have so understood the offer; for after stating that, "the appropriation of your commission, with what aid I may otherwise obtain, I think will enable me to consummate the matter," and saying, "I will give it my attention on Monday, and in the mean time if you see Carr, hurry him up," he declares, in conclusion; "of

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course I shall keep back a portion of the jewelry to supply any deficiency."

The obvious meaning of the correspondence is simply this: The plaintiff to make it easier for the defendant to advance some money, instead of paying wholly in goods, if he preferred that course to delay in carrying the contract into full effect, offered to delay the payment of the \$90 to himself, and thus put the defendant in funds to that amount, to be used for such purpose, and funds which he would not have had to be so used, if he paid the commissions at once.

The defendant accepted the offer as thus made, and thus understanding it. The concluding paragraph of his letter, expressed a purpose to protect himself, by retaining enough, in value, of the jewelry and goods, to cover and reimburse himself any amount of money he might agree to pay in lieu of paying in goods, to enable Carr to carry his contract into effect.

We think it quite clear that, there is nothing in the correspondence which imports that, the plaintiff relinquished his commissions, or could have been understood by the defendant as doing so. There must be a judgment for the plaintiff on the verdict.

J. LA FARGE, Plaintiff and Respondent, v. HALSEY & HALSEY, Appellants.

A wrongful eviction of a tenant only suspends the rent or excuses the tenant from the payment of rent thereafter accruing, but does not prevent the collection of that which had already accrued and become payable.

In an action against the tenant for the recovery of such rent, the only use which the defendant could make of a subsequent eviction, would be by way of a recoupment of the damages he had sustained therefrom. The sureties of a tenant in an action against them for the recovery of rent accrued, cannot avail themselves of a defence that would be only available to the tenant, by way of a recoupment or counter-claim.

Where the tenant has a claim against the landlord, which is a distinct cause of action, the sureties, unless the claim has been assigned to them, can have no right to use it or any part of it for their own benefit.

Whether the sureties under special circumstances, such as the insolvency of the tenant or his collusion with the landlord, may not be entitled to relief in a Court

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of Equity, is a question which the Court declined to consider, as in the case before it no facts showing a title to any equitable relief were set forth in the answer. Order allowing a demurrer to a separate defence in the answer affirmed with costs.

(Before DUEK, BOSWORTH, and WOODRUFF, J.J.)

Heard, April 25; decided, May 2, 1857.

THIS action comes before the Court, at General Term, on an appeal by the defendants, from an order at Special Term made by Mr. JUSTICE HOFFMAN, sustaining the plaintiff's demurrer to the third defence contained in the answer. The pleadings, upon which the questions of law arose, are fully set forth in the opinion of the Court.

Ira D. Warren, for the appellant.

H. A. Cram, for the respondent.

BY THE COURT. WOODRUFF, J.—This action is brought against the defendants, Benjamin T. Halsey, and Elmore C. Halsey, as sureties for the payment, by Laura Keene, of the rent of the Metropolitan Theatre, which was let by the plaintiff to the said Laura Keene, from the 17th day of December, 1855, to the first day of September, 1856, at the rent of \$400 per week, payable in advance, on Monday of each week; and recovery is sought for the rent, for four weeks, which became due on the 30th day of June—the 7th, 14th and 21st days of July, respectively, amounting to \$1,600, which the complaint alleges to be in arrear and unpaid.

The agreement, by which the premises were let and taken, provides, among other things, that if the rent be not paid, the lease shall terminate, and the plaintiff may resume the possession of the premises. The agreement further provides, that "in case the said Laura Keene shall be in possession of the demised premises on the 1st day of September, 1856, and shall have paid the rent in full, and performed the other covenants herein contained, she shall be entitled to retain the theatre for three or five years longer at the same rent, and upon the same conditions, provided she shall have given said La Farge, on or prior to the first day of May, 1856, written notice of her intention to take said pre-

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mises for three or five years, from the first day of September, 1856."

The defendants admit that they are sureties for the payment of the rent, as set forth in the complaint.

The first defence consists of a denial that the plaintiff performed his covenants, and a denial that there is any rent due or owing from their principal.

The second defence sets up a tender, by the said Laura Keene, of the rent which became payable on the 30th of June, and the 7th and 14th of July, respectively, amounting to \$1,200, and that the plaintiff refused to receive the same.

It is unnecessary to notice those defences further, since they are not demurred to, and in determining the sufficiency of the third defence, we are to consider it as the defendant has chosen to set it up, viz. "as a separate and distinct defence" to the whole cause of action.

This third defence, (which is demurred to,) consists of allegations, that, (at some time not stated) Laura Keene called on the plaintiff, in relation to the notice required by the terms of the lease, for the purpose of continuing or extending the same for a longer term than one year. That the plaintiff then waived such notice, and agreed that she should continue in possession of said theatre, upon the same terms, &c., without serving any written notice. That relying upon said agreement, she entered into numerous engagements, with members of her company, at large weekly salaries, agreeing to open said theatre in September, 1856, and that by reason of the conduct of the plaintiff hereinafter set forth, she was unable to fulfil such engagements, and thereby sustained great damages.

And that relying on the said agreement she expended large sums, in alterations and making permanent and valuable improvements on the premises, of the value of \$10,000.

And, finally, that afterwards, and in the month of July, the plaintiff, in violation of his agreement, and in violation of the covenants of said lease, took possession of said theatre against the wishes and without the consent of the said Laura Keene, and for the first time informed her that he had changed his mind, and that she could not have said theatre for any longer time.

By reason of which conduct of the plaintiff, and his violation

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of his agreement aforesaid, she sustained damages, in loss of scenery, decorations, &c., and by reason of being unable to fulfil the engagements so made as aforesaid, to the amount of \$10,000, which sum, or so much thereof as may be sufficient to cancel any claim the plaintiff may establish at the trial, the defendants ask to recoup and set off, &c.

The counsel for the defendants, upon the argument of the appeal (taken from the order of the Special Term, sustaining the demurrer to this third defence), concedes, in express terms, in the written points submitted, that he does "not say that we (the defendants) have a right to offset or recoup the damages which Laura Keene has sustained; but we do say that we are entitled to all the facts alleged in the part of the answer demurred to for the purpose of showing that Laura Keene is not indebted to La Farge, and therefore the defendants, as her sureties, are not liable."

It is quite clear that, upon the facts alleged in this part of the answer, Laura Keene herself has no defence, unless it be by way of recoupment, or counter claim. The only fact here alleged, which is charged in the answer as a violation of the covenant in the lease (to which the defendants became bound as sureties), is, that the plaintiff, in the month of July, 1856, took possession of the theatre against her wishes, and without her consent. Giving this averment the construction most favorable to the defendants, by conceding that this sufficiently alleges an eviction,—still it is not alleged that this took place before the rent for which the action is brought became payable; indeed, the averment is quite consistent with the assumption that the plaintiff took lawful possession (in pursuance of the right to re-enter reserved to him in the lease) for non-payment of the very rent for which the action is brought. An eviction only suspends the rent, or excuses the tenant from the payment of rent thereafter accruing. Rent, which has already accrued and become payable before the eviction, may be collected. In an action to recover such rent, the only use which Laura Keene could herself make of such subsequent eviction, would be by way of recoupment of her damages sustained thereby.

As to the alleged breach of the other agreement, by which it is stated that the plaintiff agreed to permit her to remain in pos-

session; In the first place, it is not alleged that this was the extension of her term for either three or five years, for which, upon certain conditions, the lease provided; but that on her calling upon him for the purpose of continuing the lease for a longer term than one year, he waived the service of the said notice and agreed that she should continue in possession upon the same terms and conditions mentioned in said lease. To this agreement it is not alleged that the defendants were parties or privies.

The breach of this agreement, if any breach were sufficiently alleged, would be no discharge of the rent accrued upon the lease itself,—at most it would be a cause of action founded on contract, which, under § 150, sub. 2, of the Code of Procedure, Laura Keene, if defendant, might or not, at her election, use as a counter-claim. She might, if she preferred, bring a separate action for the damages sustained by such breach. In this aspect of the agreement, all that is alleged concerning her expenditure, and her damages sustained by inability to fulfil engagements with others, amount only to a counter-claim, even if it be conceded that what are called damages arising from such inability, could in any form be allowed to her.

And, in the next place, if upon a very latitudinarian construction of the averment, we should assume that the pleader meant that the plaintiff waived written notice, and consented to the extension of the lease for three or five years, as provided in the lease itself; still, as the alleged breach of this agreement is not alleged to have been committed before the rent sued for became payable, it remains as before, a mere matter of recoupment, or counter-claim. When the rent became payable, a complete cause of action became vested in the plaintiff—his right to the rent was perfect and without defence, strictly so called—any subsequent breach of even the same agreement could only be availed of by way of recoupment, in abatement from, or extinguishment of his clear legal demand.

And again, inasmuch as the lease did not provide for any such extension unless the rent was paid in full, and the alleged parol agreement is alleged to waive the written notice, and warrant her continuance in possession only on the same terms and conditions as were expressed in the lease, it follows that as the defendants have not alleged that the rent was paid in full down to

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the time of this alleged breach, they have failed to show that, even by way of recoupment, Laura Keene could claim anything; they have thus failed entirely to show that this agreement was ever broken by the plaintiff.

If, therefore, there is anything in this defence which could avail their principal, had she herself been the defendant, it would, at most, be the allegation, that during the term, the plaintiff took possession against her will,—and if in this she had sufficiently shown an eviction, she might recover the damages sustained thereby. It has already been suggested, that enough is not alleged to amount to a wrongful eviction,—it is not stated that the rent to that time had been paid, and if not, the plaintiff had a right, by the very terms of the lease, to re-enter, although against her will, and might have enforced his right to resume possession by legal proceedings, if his entry was resisted, or the possession insisted upon by her.

Finally, if by reason of any fact stated as a part of this defence, Laura Keene might have set up a counter-claim or recoupment, these defendants cannot. She has assigned no such claim to them, and, without that, they have no right to use what is in her a distinct cause of action, nor to use any part of it for their own benefit. If they are compelled to pay the rent, they must seek reimbursement from her, and she will have her recourse to the plaintiff for any damages she has sustained. That claim for damages these defendants have no right to diminish nor impair; and if she were to prosecute such claim, nothing done or proved by these defendants in this action could be permitted to diminish her recovery.

Whether sureties, by presenting a claim to use such a defence as a recoupment in right of their principal, where their principal is insolvent, or is colluding with the plaintiff to their prejudice, or where other grounds for equitable relief are shown, may cause their principal to be brought in as a party; or may have proceedings stayed until the plaintiff has litigated the matter with their principal; or may have equitable relief in any form, it is unnecessary to say. No such case is here presented.

In every view of the subject, the order appealed from must be affirmed.

**SPENCER M. CLARK and EDWARD M. COLEMAN v. AUGUSTUS
E. MASTERS and EZRA NYE.**

A notice, given to the consignee of goods by the master of a vessel of her arrival, is not equivalent to a personal delivery of the goods, so as to entitle the master to demand the immediate payment of freight. The freight cannot be claimed until the goods have been unladen and a delivery has been made or tendered.

The delivery of merchandize by the master of a vessel, and the payment of freight by the owner and consignee, are simultaneous and concurrent acts; so that the master is not bound to deliver the goods until the freight is paid or tendered, nor the owner to pay the freight until the goods are unladen and delivered, or the delivery is tendered.

But the owner is not bound to accept a delivery and pay the freight, until he has had an opportunity to examine into the state and condition of the goods, and to ascertain their quantity, since he has a right to deduct any damage they may have received on the transportation not imputable to the perils of navigation, and any deficiency in quantity from the usual or stipulated freight. Hence, if the quantity and quality of the goods cannot be ascertained by an examination on board, it is the duty of the master to unlade them and place them in a situation in which the necessary examination may be had.

Such is emphatically the duty of the master when the owner of the goods offers, at his own expense, to tranship the goods into a lighter for examination, and to continue the lien upon them during such examination.

The contract of affreightment, in respect to each consignment, is entire, and the master has no right to divide it into lots or parcels and demand a *pro rata* or proportionate freight on each. No portion of the freight is demandable until the whole consignment has been delivered, or tendered for delivery.

Held, that as the charge of the Judge upon the trial, in effect denied the above propositions, the exceptions to it were well taken, and there must be a new trial, costs to abide event.

(Before DUKE and HOFFMAN, J.J.)

Heard, May 6; decided, May 9, 1857.

MOTION for a new trial upon a case containing exceptions, which, at the trial, were ordered to be heard, in the first instance, at the General Term. The action was tried before Mr. Justice Campbell, and a jury, in April, 1855.

The action was for the wrongful detention of a large quantity of wheat, valued in the complaint at \$4,822. The complaint claimed damages for the detention of the goods to the amount of \$5,000.

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The defence, substantially was, that the wheat had been detained in consequence of the wrongful refusal of the plaintiffs to pay the freight and other charges of transportation.

The following is a statement of the facts of the case as established by the evidence on the trial.

The firm of Fitzhugh & Littlejohn were common carriers, doing business as such between Oswego and New York, under the name of the Old Oswego Line, and in the month of November, 1853, at Oswego, took on board the "Canada West," one of their boats, 2412 bushels of wheat in bulk, to be transported to New York, and there delivered without delay to the plaintiffs, who were the consignees named in the manifest of the boat.

Early in the morning of the 22d of November, the "Canada West" arrived at New York, and was taken to Pier No. 5, East River, which was the usual landing-place of the Old Oswego Line. Immediately after its arrival the following notice in writing was sent by the agent of the line to the plaintiffs, by whom it was received about 10 o'clock, A. M. :—

"Landing from Old Oswego Line; Lake Boat, Canada West, Pier 5, East River, foot of Broad Street, consigned to Clark & Coleman, to whom the owners of the line look for the payment of the following charges :

"New York, Nov. 22d, 1853.

Please send chgs. before delivery.

F. S. LITTLEJOHN, Agent,
Office, 100 Broad st.

		charges.	\$	cts.
'Acct. of				
656 ¹ • bus. Genesee Wheat,		\$167 32		
1755 ² • bus. " "		465 34	632	66

Not accountable for shortages, unless weighed out by suitable scales and hopper.

If towed from slip, subject to half lighterage."

The plaintiffs had been accustomed to receive similar landing notices from the same line before, excepting the claim for pay-

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ment of charges before delivery, which was unusual, and was insisted upon by the line in this instance, because of a previous dispute between the parties in relation to a distinct matter, and as the agent of the line said, "he did not choose to trust the plaintiffs."

At one o'clock, in the afternoon of the 22d, the plaintiffs sent to the agent of the line an order in writing, as follows:

"New York, 22d Nov., 1858.

F. S. LITTLEJOHN, Agt.,
Old Oswego Line.

Please send the boat Canada West with 2412⁰⁰ bus. wheat to the foot of Broome st., E. R., and the N. Y. City Mills, cor. Lewis and Broome sts. will discharge it.

Rep'y yours,

CLARK & COLEMAN."

Very soon after, a clerk of the line called at plaintiffs' office and demanded the freight, and Mr. Clark, one of the plaintiffs, told him, that the freight was ready for him as soon as the wheat was delivered.

Nothing more passed between the parties till the morning of the 23d, when the plaintiffs offered to send a lighter alongside the canal boat, and proposed to the agent of the line that he should unlade the wheat into the lighter, keeping it still in his possession, and retaining his lien upon it; that if the wheat was found right in quantity and condition, the freight and charges would be paid upon its delivery to the plaintiffs: such delivery to take place on board the lighter.

He refused to do anything until the freight and charges were paid, but offered to deliver bushel by bushel, on being paid bushel by bushel, for freight and charges at the same rate.

He never departed from his requirement that before putting the wheat out of his boat all charges should be paid, except that he would put it out bushel by bushel, or bag by bag, on being paid freight bushel by bushel or bag by bag. He never offered to put the grain out of his boat, where the plaintiffs could see its quantity and condition, he retaining possession until they paid the freight and charges. The agent of the carriers, however,

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testified that, the condition of the wheat might have been examined on board the boat, "by instruments and by shovelling down."

To the demand of the plaintiffs that the wheat should be delivered at Broome street, the agent of the line made the same answer. He demanded that freight and half lighterage should be paid before he would have the boat start from Pier 5, for Broome street, but finally offered to deliver it wherever the plaintiffs chose, on being paid freight and charges bushel by bushel, as delivered.

The plaintiffs expressly and repeatedly stated to the agent of the line that they did not want the possession of the wheat till they paid the freight, but wanted to know that it was right in quantity and quality. They demanded that the carriers should, at their own expense, place the wheat out of the canal-boat where the plaintiffs could see its condition and quantity, before delivery and payment of freight.

In the evening of the 23d the agent of the line sent the boat away from the pier, and placed the wheat in store in one of the storehouses of the defendants, who continued so to hold it subject only to the order of Fitzhugh and Littlejohn until after the service upon them of the summons and complaint in this action. On the 1st of December the defendants notified the plaintiffs of its being so held by them. On the 29th of December the plaintiffs tendered to the agent of the line \$632,66, being the full amount of freight and charges as stated in the landing notice, and thereupon demanded possession of the wheat in store, and upon refusal to deliver it unless the plaintiffs also paid half lighterage and storage and insurance, they commenced this action for its recovery.

The testimony being closed, the Judge charged the jury that in the case of transportation by common carriers by ships or vessels, personal delivery to the consignee was dispensed with, and notice to the consignee of the arrival, came in lieu of personal delivery: that it was not disputed in this case but that such notice was properly given. It was also undisputed that the wheat sued for, was capable of being fully examined and inspected on board the boat, as it was when it arrived in port, so as to determine its quality and condition, and *that* it was so examined by the

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plaintiffs and was sold by them while on board the boat, and after such an examination. That the plaintiffs claimed that the carriers were not entitled to payment of their freight, until the wheat had been put out, so that plaintiffs could see and examine its condition, before paying the freight. What might be the rule when the cargo could not be examined on board as to its quality and condition, it was not then necessary to determine; but in this case, the carriers were not bound to afford any further opportunities for an examination as to quality and condition than had been done. That in the opinion of the Court, the carriers were not obliged to put out the cargo, so as to show the whole quantity to be there, before becoming entitled to freight; that such a rule would impose great labor and expense on the carriers, besides endangering their insurances, &c. That in the opinion of the Court, the carriers had done all that was required of them, in this case, to entitle themselves to their freight, and that they had a right to require the payment of the freight before turning out the whole of the wheat. That whether that freight was required to be paid in gross, before the delivery of any part of the wheat, or parcel by parcel, on delivery in the same manner, was immaterial in this case, as the plaintiffs could not recover upon the facts they had shown, and that defendants were therefore entitled to recover the subsequent charges, which were admitted to be the sum of \$130 85, with interest from January 28, 1854.

To this charge of the Judge and each alternative direction thereof the plaintiffs' counsel then and there excepted.

But further, you will specifically find and answer whether the defendants' bailors did or did not make the further offer to deliver, stated by the witness Littlejohn, as follows: "I stated to Mr. Clark, that if he would furnish a lighter at his own expense and risk, and pay the cost of transferring the grain, he relieving me from claim for shortages if measured out, and he assuming the risk of the wheat in the lighter, and allowing me to retain possession and lien till it was all to his satisfaction, I would do so, or that I would put it in elevators on the same conditions; then he was to pay the freight and charges and receive the property."

His Honor also directed the jury to assess the value of the property claimed by the plaintiffs.

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The jury, thereupon, found a verdict for the defendants for \$141 52, and specially found, in answer to the specific question proposed to them, in the negative, that no such offer was made. They assessed the value of the property claimed at \$4,000, that sum being agreed by the parties.

This case is made with liberty to either party to turn the same into a bill of exceptions or special verdict.

The exceptions to be heard in the first instance at General Term.

W. M. Evarts, for the plaintiffs.

J. B. Yates Sommers, for the defendants.

BY THE COURT. DUER, J.—We are clearly of opinion that the Judge erred in the instructions that he gave to the jury, and that upon the facts in evidence not contested, and the special finding of the jury, the plaintiffs were entitled to a verdict; they had proved all the facts necessary to maintain the action.

If, indeed, the special question put to the jury, whether “the witness, Littlejohn, stated to Mr. Clark, that if he would furnish a lighter at his own expense and risk, and pay the cost of transferring the grain, he relieving me from claims for shortages, and assuming the risk of the wheat in the lighter, and allowing me to retain possession and lien until all was to his satisfaction,” had been answered in the affirmative, the aspect of the case would have been materially changed, and there would have been grounds for arguing that the defendants were entitled to retain their verdict. But the question was answered in the negative, and by this answer the jury, in effect, declared that the statement of Parish, the clerk of the plaintiffs, was entirely correct, namely: he told Littlejohn that “we (the plaintiffs) would furnish a lighter alongside the boat, or he might furnish a lighter, at our expense, and transfer the wheat into it, and when it was transferred we would pay the freight and take possession of it;” and on his cross-examination, that “his offer of a lighter was intended to cover the whole matter of expenses except weighing.” Such, we are bound to say, are the facts of the case, and the question that arises upon them is, whether Littlejohn was not bound to comply with the proposal thus made, and deliver the wheat in

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conformity to its terms? If he was, he had no right to store the wheat, and the defendants, with whom it was stored, in refusing to deliver it to the plaintiffs upon request, were guilty of a wrongful detention. If he was not so bound, the defendants were justified in their refusal, and the verdict must stand. There is plainly only one ground upon which the refusal of Littlejohn to deliver the wheat, upon the terms proposed, can be vindicated, namely: that in giving notice to the plaintiffs of the arrival of the wheat, he had done all he was bound to do, and was entitled to demand the payment of the whole freight and charges, before any part of the cargo was moved; that the notice, in other words, was equivalent to actual delivery. The law was thus laid down by the learned Judge upon the trial, and he founded on it a positive direction to the jury to find a verdict for the defendants. His language was explicit, that in the case of transportation by common carriers—by ships or vessels—personal delivery to the consignee was dispensed with, and notice to the consignee of the arrival came in lieu of a personal delivery; and that, in the opinion of the Court, the carriers had done all that was required of them to entitle themselves to their freight, and that they had a right to require the payment of the freight before turning out the whole of the wheat;—propositions that amount to saying, that where notice of arrival has been given, the master may instantly and rightfully demand the whole freight, although no portion of the cargo has been discharged, and no opportunity has been given to the consignee of examining its condition and ascertaining its quantity.

We must think that, in these propositions, our learned brother was entirely mistaken; and it seems to us manifest, that the source of the error was his own application of the rule that exempts the carrier of goods by a ship or vessel from the duty, which, as a general rule, the law imposes upon a common carrier, viz., that of delivering the goods, which he transports, to the owner or consignee personally, at the place where the transportation ends. He is bound to seek the person to whom the delivery is to be made, and make its tender, and, consequently, must have the goods with him when the tender is made.—*Gibson v. Culver*, 17 Wend. 305; *Mayell v. Potter*, 2 John, Cases 371; *Fisk v. Newton*, 1 Denio, 45; *Price v. Powell*, 3 Coms. 322;

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Schroeder v. Hudson R. R. Co., 5 Duer 62. The law, by a very reasonable exception, releases the master of a vessel, in which the goods to be delivered are transported, from the duty of seeking out the owner or consignee, and making to him, personally, an actual delivery or tender of a delivery; but, in his case, holds it to be sufficient that he gives a written notice to such owner or consignee of the arrival of the vessel, and of the place where the goods will be landed, and their delivery be made; thus casting upon the consignee, the duty of attending at the place so designated, of receiving there the delivery of the goods, and paying the freight for their transportation. We think, however, that we are entirely safe in saying that there is no authority, nor semblance of an authority, for the position that the notice, by the master of a vessel, of the place where he intends to deliver the goods, has the same effect as an actual personal delivery or tender by an ordinary carrier, so as to give to the party in the one case as well as in the other, an immediate right to demand the payment of the freight. We believe the doctrine to be absolutely novel. We are certain it would be most unreasonable. The ordinary carrier in tendering the goods themselves, does all that the law can require him to perform, all indeed that he can do, to entitle him to his freight. The master, in giving notice to the consignee, performs only a part of the duty that he is bound to perform, to render his demand of freight consistent with law or reason.

It is a serious mistake to suppose that the payment of freight is a condition precedent to the delivery of the cargo in the sense that has been contended for, that is, precedent even to the discharge of the cargo. The discharge or unlading of the cargo, is a duty that the law casts upon the master, the whole labor and expense must be borne by him or his owner. To enable him to deliver the cargo, this duty of unlading it must first be performed, and its performance is as truly a condition precedent to the constructive delivery of the goods by a tender, as to their actual, by a change of possession.

The payment of freight and the delivery of the goods are simultaneous and concurrent acts; neither, strictly speaking, is a condition precedent to the other. As in the case of the delivery of a deed, and the payment of the purchase money agreed to be

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made on the same day, they are conditions mutually dependent. The consignee is not bound to pay the freight until the goods are delivered, nor the master to deliver the goods until the freight is paid. If the goods are withheld the freight must be tendered, if the freight, the goods, to enable either party to maintain an action against the other, for a breach of contract. Hence, in the present case, if the master was not in a condition to make an immediate delivery of the wheat, he could have no right to demand the payment of freight; and he certainly could make no delivery that the plaintiffs were bound to accept, so long as the wheat remained on board his vessel, and the duty of discharging it rested upon him. Thus the allegation that the notice which the master had given, was alone sufficient to justify his demand of freight, it seems to us, is proved to be groundless. It evidently escaped the attention of the learned judge who tried this cause, and, perhaps, of the counsel, that to discharge the cargo is a duty that belongs to the master, and his performance of it, unless otherwise agreed, a condition precedent to his claim for freight.

But there are other, and very conclusive reasons, for holding that the claim of the master, in the present case, for the whole freight, before the wheat, or any portion of it, was delivered or offered to be delivered, cannot be sustained. We apprehend that it is now settled law, that the owner of goods is not bound to accept their delivery, and pay the freight, until he has had an opportunity of ascertaining how far they correspond in quantity and description with the bill of lading, and of examining into their actual state and condition. He has a right to deduct from the usual or stipulated freight any damage which the goods may have received on the voyage, not imputable to the perils of navigation; and also, any deficiency from the quantity mentioned in the bill of lading; and it is evident, that to enable him to exercise this important right, an examination, prior to the payment of freight, is indispensable. If all the facts, necessary to be known by the owner, can be ascertained by him before an unloading of the cargo, the examination may then be had; but if not, the goods must be unladen at the expense of the master, and placed in a situation to enable the owner effectually to exercise his rights; this right was very distinctly claimed by the plaintiffs

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in the present case, and as plainly denied by the master; denied by his refusal to place the wheat in a situation in which it could be examined, unless the whole freight were previously paid. It is true he offered to deliver the wheat, bushel by bushel, receiving a *pro rata* freight for each bushel as delivered; but it is very clear that this was not an offer to which the plaintiffs were bound to accede. The contract of affreightment, in respect to each consignment, is entire, and no portion of the freight is due until the whole consignment is delivered. The master has no right to divide and split up the consignment into as many lots or parcels as he may deem convenient, making as many contracts as there are parcels, and as many freights as there are contracts. The freight, when payable, is payable as a whole, and it is not payable until all the goods to which it relates have been delivered or tendered.

If before it has been ascertained that the goods to be delivered are all undamaged, and that there is no deficiency in quantity, the master is allowed to divide the consignment into parcels, and demand pay for each parcel as delivered, it was justly observed by the counsel for the plaintiff, that the right of the consignee to recover for damages, or a deficient quantity, may be effectually defeated. One half of the cargo may have been delivered in this form in a sound state, and the *pro rata* freight paid, and yet the damage to the residue may exceed the whole freight, which the consignee, had there been no damage, would have been liable to pay; one half of this amount, however, he has already paid, and unless this is immediately refunded, his only remedy is by an action for its recovery. The right of retaining it, which the law gave him, is gone. It is stated in the Judge's charge, that the wheat might have been examined on board the boat as it was when it arrived, so as to ascertain its quality and condition; but, upon considering the whole evidence, this question appears so far doubtful, that had it been material, we think it ought to have been submitted to the jury. Let it be admitted, however, that the quality and condition of the wheat might thus have been ascertained, it is not pretended that the fact, that it corresponded in quantity with the call in the bill of lading, could have been ascertained otherwise than by its removal from the boat. This fact, however, was just as important to be known to the plaintiffs, as the

state and condition of the wheat, and they had exactly the same right to require that it should be ascertained, before they could be required to pay any portion of the freight—indeed, until it was ascertained, the amount of the freight that would be payable could not be known; it could not, therefore, be demanded; a conjectural payment, on account, the defendants had no right to exact, nor were the plaintiffs bound to make. It is said that the unlading of the wheat, for the purpose of ascertaining its quantity, would have been attended with great labor and expense; but if this unlading was a duty which the carriers undertook to perform, if its performance was necessarily implied in their contract to transport and deliver the wheat, the question of its labor and expense was plainly immaterial. We are bound to presume that they were taken into consideration in fixing the amount of the freight. The allegation that the carriers, by unlading the wheat as requested, would have lost their insurance, we do not exactly understand. If this was a usual and proper mode of discharging cargo from canal boats, an insurance, in the usual terms, would not have been lost. But were this otherwise, if the risk was one which the carriers knew that, in the performance of their duty, they would incur, they should have framed their insurance to cover it, and by not doing so, agreed to assume it. The result is, that the master violated his duty in refusing to unlade the wheat, as requested, and in making the payment of freight a condition precedent. The wheat, it seems, and was admitted, could not with propriety have been discharged upon the wharf to which the canal boat was moored, and it thereby appears that the usage is to discharge such cargoes into lighters brought alongside the boats for that purpose. We do not see why it was not the duty of the carriers in this case to have provided such a lighter, at their own expense, and according to the usage have discharged the cargo. The allegation that by so doing they would have lost their lien for the freight, we consider to be groundless. So long as the examination into the condition and quantity of the wheat was going on, and until the amount to be paid for freight was ascertained, the carriers would have retained their possession and their lien—just as certainly as if the wheat had remained on board the canal boat, and the necessary examination had there been made. The mere

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transfer of the wheat from the boat into the lighter could never have been construed as a final delivery to the plaintiffs, changing the possession, and thereby extinguishing the lien of the carriers.

But whether the carriers were bound to provide a lighter, and whether by so doing they would have lost their lien, are questions which it is not here necessary to determine. The plaintiffs offered, at their own expense, to provide a lighter, and that the carriers should retain their possession, and consequently their lien, until the freight was ascertained and paid. It was the manifest duty of the master and his owner, Littlejohn, to have complied with this offer, by unlading and delivering the wheat in conformity to its terms; their refusal to comply with it was in effect a refusal to deliver the wheat at all. It was a breach of their contract, amounting in law to a wrongful conversion to their own use of the property they had undertaken to deliver, and the defendants, by refusing to surrender to the plaintiff, upon request, the property thus wrongfully converted, were guilty of its wrongful detention. Upon the evidence on the trial, the plaintiffs were entitled to a verdict for its full value.

The verdict for the defendants must therefore be set aside, and there must be a new trial, with costs to abide the event.

AUGUSTE BELMONT v. ROBERT B. COLEMAN and CHARLES A. STETSON.

When improper or irrelevant evidence has been admitted by a referee, the error in its admission will be disregarded if it manifestly appears that the evidence could not have influenced his decision, and that his conclusions must have been the same, had it not been received.

A bill of exchange, drawn upon an incorporated Company, and accepted by its president, is presumptive evidence that it was founded on a sufficient consideration and was drawn for legitimate purposes within the purview of the charter of the Company.

In an action in which the plaintiff relies upon the validity of the bill as binding the Company, the burthen of proof, when its validity is denied, as drawn for purposes not within the lawful powers of the Company, rests upon the defendant.

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Is an action against an individual stockholder of an incorporated Company, by whose charter the stockholders are made liable for its unsatisfied debts—the record of a judgment against the Company, and an execution thereon returned unsatisfied, are *prima facie* evidence that the debt so recovered was a valid debt of the Company, and the burthen of proving collusion or mistake is cast upon the defendant.

Judgment for plaintiff, upon the report of a referee, affirmed with costs.

(Before BOSWORTH and HOFFMAN, J.J.)

Heard, February 12; decided, May 9, 1857.

THIS action comes before the Court at General Term, on an appeal by the defendants from a judgment in favor of the plaintiff, entered upon the report of a referee.

The plaintiff, before commencing this action, had recovered a judgment against a corporation, of which the defendants are stockholders; and this action is brought, to recover of the defendants, as such stockholders, the amount of such judgment, on the ground that they were such stockholders when the corporation contracted the debt, on which such judgment was recovered.

The judgment was recovered upon two bills of exchange for \$4,000 each, purporting to be drawn by the Vice-president and Agent of the Mexican Ocean Mail and Inland Company, upon the President of such Company, in favor of N. Davidson. Each bill was dated November 25th, 1853. Such judgment was entered against the Company on the 8th of June, 1854.

The complaint avers, that before the maturity of the bills, the said corporation accepted the same in writing, and the payee endorsed the same to the plaintiff.

That the said corporation did not pay the bills, and that on the 8th of July, 1854, the plaintiff recovered a judgment against the corporation on such bills for \$8,889 55. That an execution was issued upon such judgment to the Sheriff of the County of New York, and by him returned wholly unsatisfied.

That the capital stock was one million five hundred thousand dollars, divided into fifteen thousand shares of one hundred dollars each. That such capital stock has never been paid in, nor has a certificate thereof been made and recorded, according to the provisions of the act under which the Company was organized.

That was the act of April 12th, 1852, entitled "An act for the incorporation of companies formed to navigate the ocean by steamships." That the defendants are the holders and

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owners of three hundred and seventy-five shares of the stock of such corporation. That the plaintiff had demanded payment of such judgment from them, which they had refused; and that by force of such statute they were liable to pay the amount, and interest with costs.

The defendants, in their answer, after various general denials, admit that they are the holders and owners of three hundred and seventy-five shares of the capital stock of the Company; but they say that they did not become, and were not the holders and owners of such stock, or of any stock of the said Company, until after, and subsequent to the date of such bills of exchange, and until after the same had been accepted.

The bills were each drawn at four months after sight, and were accepted on the 19th of December, 1853. The referee, to whom the action was referred, made a report containing a statement of his conclusions of fact and of law, which, exclusive of the articles of association therein set forth, reads as follows, viz. :—

“To the Justices of the Superior Court :

“I, the subscriber, to whom, by an order entered in the above entitled action, bearing date the 17th day of May, 1855, it was ordered that this action and the issues therein be referred, to hear and decide the same—

“Do respectfully report, that I have been attended on the said reference by the counsel for the respective parties above named, and have heard and duly considered their respective allegations and proofs.

“And I further certify that I find as facts from the evidence before me on the trial of said action—

“1. That on the 8th day of January, 1853, Elihu Townsend, Robert G. Rankin, Otis P. Jewett, James Speyers, Simeon Draper, Albert C. Ramsay, and Gustavus A. Sacchi, made, signed, and acknowledged, before Alexander P. Sharp, a commissioner of deeds in and for the city and county of New York, a certificate in writing under an act of the legislature of the State of New York, entitled, ‘An act for incorporation of companies formed to navigate the ocean by steamships,’ passed April 12th, 1852, and that said certificate is in the words following, viz. :

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"Articles of association made and entered into in duplicate this first day of January, one thousand eight hundred and fifty-three, by and between the persons whose names are hereunto subscribed, certify, &c., &c."

"2. That said certificate in writing was filed in the office of the Clerk of the County of New York, on the 8th day of January, 1853, and that a duplicate of said certificate was filed in the office of the Secretary of State, of the State of New York, on the 25th day of January, 1853.

"3. That Robert G. Rankin was the President of said Company from January 10th, 1853, to January 1, 1855, that Albert C. Ramsay was the Vice-President of said Company during the same period, and that the principal office or place of business of said Company was, during the same time, in the city of New York.

"4. That on the 25th day of November, 1853, the said Albert C. Ramsey drew a bill of exchange in writing, in the words and figures following, viz. :—

"Mexico, November 25, 1853.

For \$4000.

"At four months after sight, pay this second exchange (first and third not paid) to the order of N. Davidson, Esq., four thousand dollars value in account, which please to account this office as advised.

ALBERT C. RAMSEY,
Vice-President
and Agent.

"To ROBERT G. RANKIN, Esq.,
President of the Mexican Ocean Mail
and Inland Co.,
New York City.

"The said bill was endorsed on the 2d day of December, 1853, by N. Davidson, the payee named therein, and was accepted in writing by said Company, on the 19th day of December, 1853.

"5. That on the 25th day of November, 1853, the said Albert C. Ramsey drew another bill of exchange in writing, in the words and figures following, viz. :—

"Mexico, November 25th, 1853.

For \$4000.

"At four months after sight, pay this second of Exchange

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(first and third not paid) to the order of N. Davidson, Esq., four thousand dollars value in account, which please to account this office as advised.

ALBERT C. RAMSEY,
Vice-President
and Agent.

"To ROBERT C. RANKIN, Esq.,
President of the Mexican Ocean Mail
and Inland Co.,
New York City.

"The said bill was endorsed on the 2nd day of December, 1853, by N. Davidson, the payee named therein, and was accepted in writing by said Company on the 19th day of December, 1853.

"6. That neither of said bills have been paid by said Company.

"7. That on the 8th day of June, 1854, the plaintiff in this action recovered a judgment in the Superior Court of the city of New York against the said The Mexican Ocean Mail and Inland Company, as the acceptors of said bills of exchange, for the sum of \$8,889,55 damages and costs; that on the same day an execution was issued on said judgment by said plaintiff, against said Company, addressed to the Sheriff of the City and County of New York, and that said execution was returned by said Sheriff wholly unsatisfied on the 9th day of June, 1854.

"8. That the capital stock of said Company has never been paid in, nor has a certificate thereof been made and recorded as prescribed in said acts, passed April 12th, 1852.

"9. That the defendants in this action, at the time of the acceptance of said bills of exchange, on the 19th day of December, 1853, were the equitable owners of three hundred and seventy-five shares of the capital stock of said Company, of the nominal value of one hundred dollars for each share; that on the 2d day of February, 1854, the said defendants became the holders of said three hundred and seventy-five shares of capital stock, and were thereafter, and until the commencement of this action, holders and owners of said shares.

"And I further certify and report as conclusions of law, from the above facts, and decide:

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"1. That the plaintiff is entitled to judgment against the said defendants for the sum of (\$9,811 26) nine thousand three hundred and eleven dollars, and twenty-six cents.

"2. That the plaintiff is entitled to recover the costs of this action.

"All which is respectfully submitted.

"New York, April 22d, 1856.

"GEO. N. TITUS, Referee."

The articles of association are omitted, as all the provisions deemed material are recited in the opinion of the Court. Exceptions to the decisions of the referee were duly filed. The case was submitted, by the counsel of the parties, upon printed points, and the points relied on are sufficiently stated in the opinion of the Court.

J. Miller, for the defendants, appellants.

T. H. Rodman, for the plaintiff, respondent.

HOFFMAN, JUSTICE:—I. The first question is upon the evidence. Is it sufficient to sustain the finding that the defendants were owners of the stock when the debt was contracted?

Upon the review of the evidence the Judge held that the referee was warranted by this evidence to find as he did. The Judge proceeded—

But it is insisted that certain evidence, tending to this point, was improperly admitted. Albert C. Ramsey was the Vice-President of the Company, and ten certificates of stock were originally issued to him on account of the defendants. They were issued on account of advances of funds—Rankin signed all the certificates. He says, "the 375 shares in question was a part of the stock belonging to the ten of the original parties who advanced the funds to procure the grants. Col. Ramsey asked me for a certificate for Coleman and Stetson's shares, and directed it to be made out in the name of Albert C. Ramsey & Co., together with other certificates for 375 shares each, to the other original parties: he gives evidence tending to show that it was, in fact,

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issued for a specific purpose, other than to or for subscribers, who had paid cash for stock for which they had subscribed.

Although, of itself, it may not be evidence that the defendants were at the time the equitable owners of it, yet it was competent to prove that it was issued for them, as a compensation for advances they had made, and that they had accepted it accordingly. The further expression, "he directed me to send them to Mr. Draper, who," he said, "acted as the representative, or agent, of the original parties," is proper so far as it shows a direction to send them to Mr. Draper for their benefit.

It being otherwise proved that Mr. Draper, in fact, acted as their agent in that respect, it would be unjust to an intelligent referee to conclude, that he might have been influenced in finding the fact of such agency, by this statement.

I think we are therefore justified in saying, that this testimony could not have influenced the referee to the prejudice of the defendants.

The objection of defendants' counsel to all the testimony in relation to the confirmation, by Coleman and Stetson, of the acts of Mr. Draper on their behalf, "was too broad," and the objection was properly overruled. If the answer of the witness, which immediately preceded the objection, and only that had been objected to, for aught we can see, the objection would have been sustained.

The fact that Draper, in the accounts which he rendered to the Company for advances made, included those made by the defendants, and that when the witness spoke to Mr. Coleman about his interest, the latter referred him to Draper, had been proved without objection. It had also been proved that the certificate for this stock, had been previously sent to Mr. Draper, and that the defendants had procured a transfer of it to themselves, saying it was for their original interest.

An objection to such a confirmation, by Coleman and Stetson, of the acts of Draper, in relation to and as representing their original interest, as was evidenced by an actual transfer to themselves of the legal title to stock, originally issued for them, and on account of their advances, would not be well taken.

We hold in this case, that the matters of evidence which were admitted against the objection of the defendants, could not

have prejudiced their case with the referee, and that if it had not been received, his conclusions must necessarily have been the same.

II. Another point, on behalf of the defendants, is, that the plaintiff was bound affirmatively to prove that the drafts were made and accepted for the use of the Company, and that the purposes for which they were drawn were within the lawful powers of the Company; that the Company was indebted, and legally indebted.

The referee has found, that the bills were drawn by Ramsey, (and that he was the Vice-President,) on Rankin, and that he was the President, "and were accepted in writing by said Company on the 19th of December, 1853."

We are of opinion, that this raises a presumption that the acceptance was made, not only for a sufficient consideration, but for legitimate purposes, within the objects and powers conferred by the charter.

The case of the *Attorney-General v. The Life and Fire Insurance Company* (9 Paige, 470) is ample authority for this proposition. That late excellent lawyer, Mr. George W. Strong, was one of the referees in the case, and held, upon a preliminary objection in the nature of a demurrer to a claim upon an instrument of the Company, in the form of a post note, that as the Company could issue such obligations, for some lawful purposes, they were *prima facie* binding. Testimony was then given, which showed satisfactorily, that those produced could not have been issued for any such purpose. This reversed the duty, and the holders were then to prove the origin and consideration to have been legal, in which they failed.

The Chancellor confirmed this decision.

In *Safford v. Wyckoff* (4 Hill, 442) this decision is cited, and its principle acted upon.

McCrullough v. Moss (5 Denio, 507) has been cited, as containing a contrary doctrine, and the head note seems to favor the counsel's view. But a very careful examination satisfies me that there is nothing, even of language, in the opinions, to warrant this proposition. On the contrary, Senator Scott, who delivered the leading opinion, says:

"The right of a corporation to make a promissory note for a

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debt incurred in the course of its legitimate business, although it is not expressly authorized" to contract in that form, appears to be conceded in our Courts—citing the case of the Life and Fire Company.

"But it is unnecessary to examine whether the Rossie Lead Company had that power. I am satisfied that the note in question was given for purposes and objects unauthorized by its charter, and, therefore, not obligatory." The learned Senator proceeds to examine the testimony which proved this position.

In the present instance, the defendants have been so far from succeeding in showing, that the purpose for which the acceptance was given, was illegal, that the evidence rather tends to the conclusion that it was, in fact, made for rolling stock, purchased for the route.

The case of *Moss v. Livingston* (4 Comstock, 208) is distinguishable, as the draft was not drawn upon nor accepted by the corporation.

See further, *The Royal British Bank v. Farquand* (36 En. L. and Eq. Rep. 142).

III. The next question is, what is the effect of the judgment obtained against the Company?

The complaint alleges, that on the 8th day of June, 1854, a judgment was recovered in this Court against the said corporation on the said drafts, for the sum of \$8,889 55, being the amount due thereon, with interest and costs. That an execution was in due form issued, and returned unsatisfied.

The answer states the want of information or knowledge as to these facts.

The plaintiff read in evidence the judgment roll, the execution, and sheriff's return, stated in the complaint.

The referee finds the judgment to have been recovered, and the execution to have been issued, as stated in the complaint,

We are warranted in concluding this to have been an adverse judgment.

What is the relation which stockholders bear to a Company organized like the present?

The provision which creates their liability is the 6th section of the Act of 1852. "The stockholders shall be severally indivi-

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dually liable to the creditors of such corporation, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such corporation, until the amount of the capital stock is paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section."

The referee has found that the capital stock had not been paid, and the certificate had not been made and recorded as prescribed.

By the 8th section, no stockholder shall be personally liable for any debt of the corporation, unless a suit shall have been brought against the corporation within six years after the debt became due; nor shall such a suit be brought unless an execution has been issued, and returned unsatisfied, in whole or in part (Sess. Laws, 1852, ch. 288).

This personal liability clause was first inserted in any public act of our state, in the statute relative to incorporations for manufacturing purposes, passed April 8th, 1811 (1 R. S. 1813, 247). By the 7th section of that act, for all debts which shall be due and owing by the Company, at the time of the dissolution, the persons then composing such Company shall be individually responsible, to the extent of their respective shares of stock. There was no clause in the act requiring a preliminary action against the corporation to recover the demand.

I have long considered that *Slee v. Bloom* (14 John Rep. 456, 20 *ibid.* 669), had settled the law to be, that a judgment against the Company, as well as an account stated between the creditor and its officers, was evidence of the debt, and was only to be invalidated upon a case properly made, by the pleading of a party questioning it, and that pleading sustained by proof. The Company had liquidated *Slee's* account, and given a bond and warrant, on which judgment was confessed and perfected. Among the points taken by the present Chief Justice Oakley, for the stockholders sued individually, was one, that they ought not to be concluded by the settlement made by the trustees with the appellant, or by the judgment; and more especially as it was grossly erroneous, &c. (19 Johnson, 472.) Chancellor Kent, it will be remembered, had dismissed the bill on the ground that the Company had not been legally dissolved.

The decree of the Court of Errors reversed that of the Chan-

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cellor, and declared, that the respondents should pay the appellant, towards the discharge of his debt against the Company, the amount of their shares of stock of \$100 on each share, or so much thereof as might be necessary to pay the appellant's debt when ascertained.

The cause was remitted to the Court of Chancery to carry out this decree. An order of reference was made, and I acted as Master under it. A separate report was made, in which the judgment was stated and the previous liquidation of the account of Slee; that the decree had left the question open, how far the liquidation and judgment operated upon the case; that various allegations of error and fraud had been made as to the amount. "And that the defendants were entitled, on the reference, to falsify and surcharge the account at large; specifying and going into proof of any error of such a nature and description as, upon a bill filed to open the account, if properly charged and duly proven, would be declared a sufficient error by the Court, to be amended under its direction."

On exceptions, Chancellor Kent held, that the judgment, though binding on the Company in its corporate character, was not so upon the defendants, when charged in their individual capacity. The acts of agents or trustees of the company were not the acts of agents or trustees of the individual stockholders.

In the Court of Errors, the decision of the Chancellor upon the exceptions was reversed.

The principle was declared, that the trustees were the agents to contract the debt. That the respondents could not impeach the consideration of the debt in any other manner, nor on any other ground, than any principal can be allowed to do so. The decree was, that the condition of the bond, on which the judgment was founded, be deemed conclusive evidence of the amount due from the Dutchess Cotton Factory.

In the case of *Freeland v. Lefferts*, March 7th, 1842, before me as Assistant Vice Chancellor, the point was taken; and I held that a judgment against the Rossie Galena Company was *prima facie* evidence of the debt, in an action against a stockholder. The views expressed were as follows:

"The bill is filed by a creditor of the Rossie Galena Company, after judgment recovered against the Company, and execution

returned to compel the three defendants to pay the debt, as stockholders of the Company."

The first question is, as to the effect of the judgment recovered by the complainants against the Company.

The case of *Slee v. Bloom* (20 Johnson Rep. 669) must control this question. The facts and decision in that case are familiar to me, having, as Master, made the report upon which the questions arose. Chancellor Kent held that the judgment was of no force at all, the corporation not representing the members in their individual liability. Chief Justice Spencer held, that the judgment was evidence, but did not, in itself, exclude the parties from showing fraud or illegality in obtaining it. I may be permitted to observe that this was, in principle, in accordance with the Master's views in the case; but the Chief Justice also held that, upon the pleadings as they stood, and the proofs made, "there was no foundation laid for impeaching the account, which had not been fully and satisfactorily met and repelled."

The impeachment of the debt was made in the pleadings, entered upon in proof, and there was no reason or practice, justifying a further inquiry to the same matters, in the Master's office.

It is difficult to use language more precise or more applicable to the present case than that of the Chief Justice. He says, (p. 685) "We must regard the judgment as a solemn admission merely, on the part of the Company, of indebtedness; but it is not, of itself, binding on the stockholders, if it was obtained by fraud, or founded on error. The appellant has stated, in his bill, the origin and consideration of his debt, and the manner of its liquidation, and it was competent for the respondents, in their answers, to have impeached it. But they were bound to have specified, in their answers, the particular facts on which they relied."

But, it has been urged, that the decision in *Slee v. Bloom*, is not binding in this case, because the stockholders under this statute, are bound for the whole debt; but, under the general Manufacturing Act, only to the amount of their stock. This is only an extension of liability. I cannot see how it changes the force of the representative character. The present statute does not, in terms, make the judgment even *prima facie* evidence, although it requires a judgment first to be obtained against the Company. The Manufacturing Act was in no wise stronger,

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being merely, "that for debts which shall be due and owing by the Company at its dissolution, the members shall be individually responsible, to the extent of their respective shares of stock."

Thus, then, the law seems to be, that a judgment against a company is primarily binding upon the members. But they may question it in any way, and upon every ground, showing illegality or error, when sued individually.

This privilege is sufficient to ensure justice to the stockholders. In the present case, neither of the defendants has stated, in his answer, any ground for impeaching the judgment or its consideration.

In *Bonaffe v. Fowler* (7 Paige 576), the judgment had been recovered two months after the time when the corporation was dissolved, as alleged in the bill, and was held not to be evidence of a debt.

In *Moss v. Oakley*, 2 Hill, 265, the Court held, that a judgment, under a statute similar in all respects, was conclusive as against the company, but only *prima facie* evidence of indebtedness against a stockholder. He was not a stranger to it altogether. Whether he was at liberty to impeach it on any other ground than that of fraud, it was not necessary to decide. This was under the act concerning the Rossie Lead Mining Company. (Laws, 1837, p. 441, ch. 896.)

In *Bailey v. Bancker*, 3 Hill, 188, the Supreme Court treated stockholders under such statutes, as standing in the character of partners as between themselves. But in *Harger v. McCullough*, (2 Denio, 119), the Court say, they have been spoken of (as in *Moss v. McCullough*, 5 Hill 181), as guarantees or sureties. The Court then proceed to define their character to be, as to creditors, that of principal debtors. The individuals were to be liable in the same manner as if they had not been incorporated, and this is the doctrine of *Corning v. McCullough*, 1 Comstock, 47.

The case of *Moss v. McCullough*, (5 Hill, 181,) decided this only, that when a note had been proven, given by the Company, and a judgment recovered upon it, evidence was admissible to prove anything which would impeach the note as wholly or partially invalid. The Judge, at the Circuit, had rejected such evidence because the judgment was conclusive.

It is of importance to understand, that this was decided, and nothing more. The reasoning of the learned Judges, and some

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expressions do not seem to me reconcilable with previous cases; clearly they were not necessary for the decision.

A new trial in that case was ordered.

Upon that new trial the plaintiff proved the note, and the general agency of the president, and also the judgment. Numerous questions arose, and were decided.

Upon a bill of exceptions, the Supreme Court refused a new trial. The case went to the Court of Errors, which reversed the decision, and awarded a *venire de novo*, (5 Denio 567). Senator Lott states, that he was satisfied that the note in question was given for purposes unauthorized by the charter, and therefore not obligatory.

The passage in his opinion, the only passage which bears upon this question, is the following. "A judgment by default in a suit which must have been commenced by service of process on the presiding officer, cashier, &c. cannot, without it is shown to have come" to the knowledge of the Board of Directors, have that effect, (the effect of charging the stockholder,) "especially as against a defendant who was not a stockholder, when it was obtained."

Senator Putnam's opinion does not touch this question. Senator Van Schoonhoven concurred in the views of Senator Lott.

Barlow & Talcott were for the affirmance of the judgment, which was for the plaintiff. It was reversed and a new trial ordered.

If Senator Lott's opinion is taken as the judgment of the Court, it amounts to this, and this only. The consideration of the debt on which a judgment against the Company was had, may be inquired into in an action against the stockholder. If it is by default, it amounts to nothing. The consideration being inquired into, it was illegal. Therefore the judgment for the plaintiff could not be sustained.

The case was again tried, and is reported upon a bill of Exceptions in 7th Barbour's Reports, 279. Justice Willard examines all the opinions in the Court of Errors. The Court appears to have had several opinions which are not given in Denio's Reports. The result was, that the judgment against the Company was held to be *prima facie* evidence of a debt against the defendant, open to be impeached for collusion or mistake.

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I have been favored with a communication from Mr. Justice Willard, in which he states, that this last decision did not go to the Court of Appeals, in consequence, as it was understood, of the defendant's failure. But another suit was brought against Aurill, by Moss, for the same debt; and the evidence taken was substantially the same. The same point as to the judgment, was ruled below, and approved by the General Term in April, 1849. This was carried to the Court of Appeals, and the opinion in 7 Barbour, was printed as the opinion of the General Term. It was twice argued, and in June, 1853, the judgment was affirmed upon an equal division of the Court. Upon the previous argument in 1852, there had also been an equal division.

In this state of the question, in the highest tribunal, and with my own conviction that the doctrine of *Slee v. Bloom*, remains to this day unshaken, I am prepared to hold, that an adverse judgment against a company is presumptive evidence of the debt, in an action against a stockholder after execution returned. But we entirely concur, that when an acceptance by the Company of a draft is made out, and a judgment is had upon such acceptance, and no testimony is given to show illegality in the object, there is enough to charge the individual stockholder—being a stockholder at the date of the contract, and at the date of the judgment.

The judgment should be affirmed with costs.

BOSWORTH, J., concurred, in holding that the judgment should be affirmed. Affirmed accordingly.

THE CENTRAL BANK OF BROOKLYN *v.* WILLIAM BAILEY LANG,
GEORGE M. WHEELER and DANIEL B. SAFFORD.

A promissory note was by its terms made payable to the makers' own order, but they omitted to endorse it. It was delivered by the makers, as a premium note upon an open policy, to a Marine Insurance Company. That Company was authorized "to negotiate premium notes for the purpose of paying claims or otherwise, in the regular transaction of its business." They delivered the note in suit, with others, to the plaintiffs, and had them discounted, and received the proceeds. A small

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amount of risks compared with the amount of the note had been taken and premiums earned. The note was to cover premiums to be earned. There was no evidence as to the application of the proceeds of the note, by the Insurance Company.

Held, that the note was so negotiated by the makers, by its delivery to the Company, as to make it the same in legal effect as if payable to bearer, within the statute (1 R. S. 768, § 5.)

Held, that the plaintiffs were *bond fide* holders of the note, getting it from a Company authorized in certain cases to negotiate it, and had a right to the presumption that it was discounted for an authorized purpose.

Held, that the plaintiffs were entitled to recover the whole amount, whatever might be the equities or rights between the makers and the Insurance Company.

(Before DUBE and HOFFMAN, J.J.)

Heard, May 6; decided, May 9, 1857.

THIS action comes before the Court, at General Term, upon an appeal, by the defendants, from a judgment entered upon a verdict in favor of the plaintiffs.*

The action is brought upon a promissory note made by the defendants, payable to their own order, dated the 25th of August, 1854, at six months, and held by the plaintiffs. It was not endorsed by the makers.

The Reliance Mutual Insurance Company was a Corporation organized on the 20th of August, 1853, and was empowered to make Marine Insurances. The statutes then in force, bearing upon its powers, were those passed on the 10th of April, 1849, the 25th of June, 1853, and the 13th of July, 1853. The period of the organization is admitted by counsel to be that stated.

The complaint sets forth, that the Reliance Mutual Insurance Company was a Corporation created pursuant to the laws of the state, for the purpose of making insurance, "and was authorized to receive premium notes, and to negotiate such notes for the purpose of paying claims, or otherwise, in the regular transaction of its business." That the note in question was a premium note given to such Company, and was delivered to them; that such Company, in the regular transaction of its business, without observing that it was not endorsed by the makers, did endorse the same, and offered it for discount, with other negotiable paper,

* The action was tried in November, 1856, before Mr. JUSTICE BOSWORTH, and a Jury.

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to the plaintiffs, who negotiated the same in the regular course of business.

The plaintiffs took and discounted the note and paid the money in good faith.

The answer admits, that the note was delivered to the Company on the 25th of August, 1854, as a premium note upon an open policy of insurance, that day issued by the Company to the defendants, and proceeds to set forth the grounds of defence embraced within their offer to produce testimony hereafter noticed.

The answer, by not denying, also admits the allegations as to the authority of the Company to receive premium notes, and to negotiate them, as stated in the complaint.

The note, being admitted by the pleadings, and produced at the trial, it was proven that it was delivered to the present plaintiffs with several other notes, and discounted by them, and the proceeds paid to such Insurance Company. The note was endorsed by its Vice-President. The discount took place on the 1st of December, 1854.

It was also shown that a Receiver of the Company had been appointed.

The defendants produced a book of risks, and proved that there were none other assumed by the Company on this policy, than those contained in such book. They then offered to prove that the premiums earned on the policy amounted to \$300 only; that the note was for premiums to be earned, and had no other consideration; and that as to the \$300, the defendants had counter claims.

The Judge decided that such evidence would not alone constitute a defence, and was inadmissible, unless the defendants proposed to assail the position, that the plaintiff took the note before maturity, in good faith, and for full value; that the note, under the statute, had the same validity and effect against the makers as if it had been payable to bearer, it having been negotiated by the makers; and that the plaintiffs, having taken it before maturity, for value, must recover.

To this ruling an exception was taken.

The jury rendered a verdict for the plaintiffs for \$2,246. Judgment was entered thereupon, from which this appeal is taken.

John S. Jenness, for appellant.

E. C. Benedict, for respondent.

BY THE COURT. HOFFMAN, J.—The statute applicable to this case provides, that notes made payable to the order of the maker thereof, or of a fictitious person, shall, if negotiated by the maker, have the same effect, and be of the same validity, as against the maker, and all persons having knowledge of the facts, as if payable to bearer. (1 R. S. 768, § 5.)

This act was intended effectually to remove the difficulty in making title when a note was drawn in favor of a fictitious person, and to treat a note in favor of the maker, unendorsed, as equivalent to one to a fictitious payee. (*Plets v. Johnson*, 3 Hill, 112.)

In *Smith v. Lusher* (5 Cowen, 711), Colden, Senator, observed: "Often bills are made payable to and drawn upon the makers themselves; and very often bills are made payable to fictitious payees. These bills may be mere waste paper until they are negotiated; but the moment they are endorsed, they become efficient securities in the hands of the endorsees."

And in the course of the argument, the same Senator put the question to counsel—"What would you do with a note drawn by yourself and payable to yourself?" The answer was—"It would be waste paper." "But," replied the Senator, "you pass it away." The law of the statute is comprised in these brief sentences.

The Revisers observe, that the provision in question is in conformity with the existing law.

A long series of cases, commencing with *Tallock v. Harris* (2 T. R. 174), settled, that a *bonâ fide* holder of a bill, drawn in favor of a fictitious person, and endorsed in that name by the drawer, might recover it against the acceptor. Where the acceptor knows the facts, the bill is, in truth, payable to bearer. (*Chitty on Bills*, 158, and note.)

A note drawn in favor of the maker is, in fact, drawn in favor of a fictitious payee, as far as any additional security is concerned. It should be equally treated as payable to bearer.

The note in suit, in the hands of a *bonâ fide* holder, is to be

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regarded precisely as if the makers had endorsed it, provided they negotiated it. And we consider that a note is negotiated within the statute, when it is delivered out by the maker for a consideration received, or agreed to be received, or delivered for circulation; and when, had it been actually endorsed, it would have possessed the character of negotiability. The note in question was certainly negotiated in this sense.

In *Stevens v. Strang* (2 Sandf. S. C. R. 138), a note was given by Benjamin H. Strong & Co. to the order of Ebenezer Stevens & Sons. There was no such firm in existence. It had ceased twelve years before, by the death of the father, Ebenezer. But there was a firm of Ebenezer Stevens' Sons. Proof was allowed of the consideration of the note being a sale of brandy to the makers by the plaintiffs. It was held to be a negotiation within the statute.

In the case of *Brouwer v. Hill* (1 Sandf. S. C. R. 648), the Court noticed an objection, that the legal title was not in the company, the note being payable to the maker's order, and not being endorsed, and say: "If it were delivered to the Company as an operative and valid security, the title and the property in it became vested in the company." The receiver was held entitled to recover.

And upon the point of consideration, the case of *Deraismes v. The Merchants' Mu. Ins. Co.* (1 Comstock, 371), is decisive. A note like the present is a statutory security, independent of consideration; and if that was necessary, the obligation upon the company, and other circumstances, afforded ample consideration to support it.

Without entering upon the question not arising in the case, how far the contract would have been available, had the note remained in the Company's hands, and whether it was not capable of being rescinded at any time, except for premiums earned, we are satisfied that it was negotiated within the statute. And we are also satisfied that the plaintiffs, as *bond fide* holders, are entitled to recover the whole amount, however small may have been the amount of risks undertaken for the makers. There is no evidence that the notes were discounted for unwarranted purposes. There is nothing to charge the plaintiffs with any knowledge of a misapplication, even if such misapplication in fact existed.

The judgment must be affirmed, with costs.

GEORGE CASSARD v. ELISHA HINMAN.

A contract of sale for the delivery of goods on a future day is valid in law, although the goods at the date of the contract are not in the possession, nor within the control of the seller.

Although such a contract may be valid on its face, yet, if it was the intention and understanding of the parties when it was made, that the goods should not be delivered, but that the difference between the market price on the day of delivery and that stipulated in the contract, should be paid by one of the parties to the other, according as such market price might exceed or fall short of that stipulated, the contract is not a legitimate mercantile speculation, but is a mere wager, and as such is void under the 8th section of the act "of betting and gaming" (1 R. S. p. 669). Whether such was the intention of the parties is a question of fact, which in an action for the breach of the contract, in which a defence under the statute is set up, must be determined by the jury upon extrinsic evidence. The admission of such proof is not a violation of the rule that forbids the introduction of parole evidence to contradict or vary the terms of a written agreement.

Order overruling a demurrer to a defence under the statute, affirmed with costs.

(Before DUB, BOSWORTH, HOFFMAN, SLOSSON, and WOODRUFF, J.J.)

Heard, May 9; decided, May 16, 1857.

THIS action comes before the Court, at General Term, on an appeal by the plaintiff from an order made by Mr. JUSTICE HOFFMANN, in November, 1856, at Special Term, overruling a demurrer to a separate defence in the answer.

The complaint set forth two contracts in writing, signed by the defendant, by each of which he agreed to sell and deliver to the plaintiff 500 barrels of new mess pork, in all the month of September, 1856, at the price of \$17 per barrel. It alleged a breach of these contracts, and that the plaintiff had sustained damages to the amount of \$3,000, for which sum, with interest and costs, judgment was demanded.

The answer set up the following, as a third defence;—

"That at the times of making the supposed contracts in the complaint contained, the defendant was not a dealer in pork, nor did he ever hold, possess, or control the pork mentioned in the supposed contracts, nor any part thereof, all which the plaintiff well knew, as the defendant is informed and believes; that it then was not the intention of the defendant to make any actual

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sale or delivery of pork to the plaintiff, nor was it the intention of the plaintiff actually to buy or receive any pork from the defendant, as the defendant is informed and believes; that it was the mutual design and intention of both the plaintiff and the defendant, at the making of said supposed contracts, that the same should not be specifically performed in whole or in part, but on the contrary, that at the maturity of said supposed contracts the differences between the then market value of the pork therein mentioned, and the price of the same fixed in said supposed contracts, should be paid by the one party to the other, as performance or satisfaction of said supposed contracts, that the market price of pork in the month of September, then future, was at the time of the making of said supposed contracts an unknown and contingent event and a chance, and the said supposed contracts were not actual bargains and agreements for the sale of the actual property, but were mere wagers on such future market price of pork, and on the chance of such future price, and were gambling transactions, and the defendant insists that said supposed contracts by reason of the matters in this third defence stated, were and are illegal, invalid, and void, and are contrary to the statute in such case made and provided, and repugnant to the common law."

To this defence the plaintiff demurred, and from the order, overruling the demurrer, the plaintiff appealed to the General Term.

Mr. Justice HOFFMAN delivered an opinion, in support of his decision, which is reported in 14 How. Pr. R. P. 84.

James C. Carter, for plaintiff and appellant, insisted that § 8 of art. 8d, title 8, chap. 20, Part I. of the Revised Statutes, was not intended to apply, and should not be interpreted to apply, to transactions like those presented by this record. They are not within the intent of the Statute.

The transactions appearing on this record are, clearly, outside of the *letter* of the statute.

Even if it be conceded, that this statute applies to contracts in reference to sales of merchandise, when the contract falls within its provisions, and assuming, as now contended, that the

present transaction does not come within the letter of the statute, then it is insisted, that the present case does not come within the *intent* of the statute, even upon this large view of its intent.

The transaction in question is not open to objection as being an attempt to evade the statute. The *intent to evade* would, in such a case, be the unlawful ingredient, and should, therefore, form the *gravamen* of the plea. The defence, demurred to, does not allege it. A statute cannot be evaded by doing a thing which does not fall within the scope of its prohibition.

The order appealed from should be reversed, and an order entered sustaining the demurrer, with costs.

Charles Tracy, for defendant, the respondent, contended that, admitting the facts set forth in the part of the answer demurred to, the supposed contracts were, plainly, gaming contracts and wagers, and as such unlawful and void. He cited *Grizewood v. Blane*, 8 Eng. L. & Eq. R. 415, and 20 *id.*; *Rourke v. Short*, 34 *id.* 219.

BY THE COURT. SLOSSON, J.—The contract was, in itself, a good executory contract for the sale and delivery, by the defendant, of the article in question.

A party may, lawfully, contract to deliver at a future day goods of which he has not at the time, possession. (*Stanton v. Small*, 3 Sandf. B. 230.)

The question, in the present case, arises under the averments in the answer, "that it was not the intention of the defendant to make any actual sale or delivery of pork to the plaintiff, nor was it the intention of the plaintiff, actually, to buy or receive any pork from the defendant; that it was the mutual design of both the plaintiff and the defendant, at the making of the said supposed contracts, that the same should not be specifically performed, in whole or in part; but, on the contrary, that, at the maturity of said supposed contracts, the differences between the then market value of the pork therein mentioned, and the price of the same fixed in said supposed contracts, should be paid by the one party to the other, as performance or satisfaction of said supposed contracts."

The answer then avers, that the market price of pork in the

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then future month of September, (the period fixed in the contract for the delivery of the pork,) "being an unknown and contingent event, and a chance," the contract was a mere wager on the future market price, and on the chance of such a future price, and a gambling transaction, contrary to the statute, and void.

The plaintiff contends, that this was a speculative contract merely, and not in the nature of a wager; and neither within the letter nor the intent of the Statute against Betting and Gaming. That the contract, on its face, contains nothing contrary to the statute, and being in writing, cannot be varied or contradicted by parol evidence of an intent, which would go to show that it was never to be performed, and that therefore the allegation of such an intent is not good in pleading, and does not raise the question of wager at all; and he further contends, that, even if this objection is not fatal, the answer is defective, in not alleging, that the transaction was entered into with intent to evade the statute.

The rule which excludes parol evidence to contradict or vary the terms of a written instrument, applies to the construction of it only as a valid subsisting contract: but a party might always show that the instrument was void, either by reason of fraud, want of consideration, or as contravening a statute, or some express rule of the common law, or as against public policy, and for other reasons.

So infancy, coverture, or insanity may, when pleaded, be shown by parol, to avoid a written agreement.

That the answer should have alleged that the contract was entered into with intent to evade the statute, cannot be necessary, if the intent was, to do what the statute forbids, and such intent is sufficiently averred.

When the intent is to do what the statute prohibits, the adoption of a form of contract which is good on its face, necessarily shows an intent to evade the statute,

We think the averment of intent, in the present case, alleged distinctly to be that of both parties, and mutual, is sufficiently made. It is an averment of a material fact, and, therefore, admitted by the demurrer.

The question, then, is, whether the agreement thus read is

within the statute against gaming, &c., and void. The Court of Common Pleas in England, in *Grizewood v. Blane*, 20 Eng. L. and Eq. R. 290, held, that a contract for the sale and delivery of certain railway shares, at a certain price, on a future day, was, on the finding of the jury, that it was the intention of neither party actually to buy or sell, a gambling transaction, within the statute, 8 and 9 Vict. ch. 109; by which it is enacted that "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void."

WILLIAMS JUSTICE said "there was ample evidence of a mutual understanding between the plaintiff and defendant that the contract of sale was colorable only, and if so, the transaction was avoided by the statute."

The whole case turned on the question of the intention of the parties, as a question of fact, and the case, at the trial, was put to the jury distinctly upon that issue. Apart from that, the contract could not, it would seem, have been impeached.

In the case at bar, the intention, as admitted by the demurrer, is of equal force in its bearing upon the question in controversy, as would be a verdict on the point.

It was contended on the argument that the words in the English statute "by way of wager," give a broader application to it, than our own statute possesses; but to this I do not agree, nor do I see how the case of *Grizewood v. Blane* could have been otherwise decided, had the language of that statute been identical with our own.

The language of our own statute is fully as comprehensive, if not more so, than that of the English. It is, that, "all wagers, bets, or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful," and "all contracts for or on account of any money, or property, or thing in action, so wagered, bet, or staked, shall be void."

It is much broader than our former statute, entitled "An Act to prevent horseracing;" 1 R. Laws 223, § 5. In respect to this former statute, Justice Van Ness, in *Bunn v. Riker*, 4 J. R. 426, expressed his wish that, the Court had been prepared to decide that that statute had made all wagers illegal. In that case, however, it was not necessary to decide upon the construction of the

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statute, as it was one of betting on the result of an election, which was held void at common law.

A wager is something hazarded on the issue of some uncertain event. A bet is a wager, though a wager is not necessarily a bet.

The statute was, evidently, intended to prohibit all that class of agreements by which money was to be lost or won, according to the event of a mere future contingency; not hazards of buying or selling in ordinary trade in reference to a supposed future condition of the market, and by the result of which money might be lost or realized; but the putting at hazard, either a certain sum ascertained; as in the case of a bet, or a sum to be determined as to its amount by the event on which its loss or gain is to depend; as in the case of an agreement to pay mere differences. The sole inducement to such an agreement, is the hope of winning that sum in the turn of the wheel of chance. It has no respect to trade, other than as an element entering into the combinations which are to affect the event, neither has it any respect to the exercise of that honest judgment in respect to the future, and that wholesome industry in the pursuit of one's lawful business, which it is the policy of the law to encourage; but it is simply and purely a betting or staking of money on the event of a mere uncertainty, and has all the elements of a pure game of chance. Such agreements are fraught with all the evils against which the statute in question was intended to guard, and when the Court perceives that the real nature of the transaction, however unobjectionable in the form in which the parties may have seen fit to clothe it, is to do that which comes within the prohibition of the statute, it will, and as long as the statute stands on our books, ought to look beyond the letter of the contract and refuse its aid to its enforcement.

That the statute in question was thought, by the Legislature which enacted it, comprehensive enough to embrace all contracts in which the gain or loss was intended to be dependent on an uncertainty, is evident from § 10, which, expressly, excepts from its operation, contracts of insurance, when made in good faith, and for the security or indemnity of the party insured.

A wager policy, or a policy in which the insured has no interest, and which is in effect a mere betting on the chances

of a ship's safe arrival, was, before this statute, held to be a valid contract; but the Legislature, apprehensive that the generality of the terms used in § 8, might embrace honest transactions of insurance, as well as those which were of a mere gambling description, expressly provided as above, by § 10, that insurances which were of a *bond fide* character, and intended as actual contracts of indemnity, should not be affected by the statute.

It is said the present transaction is analogous to that of buying and selling stocks, of which the vendor has not the possession or title, &c., and that, as the Legislature has expressly forbidden the latter, it is to be presumed, that transactions like this, were not intended to be prohibited by the act against gaming.

This may be a true inference, so far as the contract of sale and purchase, expressed by the agreement, is concerned. On its face the contract is valid, and not within the statute. There is no statute forbidding the buying or selling of property (other than stocks) at a future time, merely because the party has not the possession or ownership of it at the time; but it does not follow that, when the contract assumes the character of a wager, it does not fall within the prohibition of the statute.

It may be said that § 7 of the Stock Jobbing Act, which expressly declares that wagers concerning the present or future price of stocks, shall be void, was useless, if section 8, of the Gaming Act, was as broad in its meaning as I contend for.

To this, it is an answer to say that, in the Stock Jobbing Act, the Legislature was dealing with a single distinct mischief, and not only making void, contracts in respect to this species of property, which it did not intend to avoid in respect to any other, but providing by way of remedy, that any money paid by way of premium or difference in respect to such contract, or in pursuance of a wager, as to the present or future price of stocks, might be recovered back. There was a propriety, therefore, in making a special enactment as to such wagers; and the Legislature may well have supposed, that in respect to all others, they were already sufficiently prohibited by section 8 of the Gaming Act.

It is impossible to read the present transaction in the light of this answer, other than as a contract to stake a certain sum, to be ascertained by the event, on the chance of an unknown contingent event—that it had no respect to trade—that it is of the

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precise character with that of a betting on an election, or on any other uncertain event—that it is fraught with the very mischief which the Statute was intended to extirpate, and is, therefore, within its spirit and meaning—that it is in effect a wager, and, therefore, void.

Judgment at Special Term affirmed.

GUSTAVUS A. CONOVER and JOHN J. CONOVER, v. ANN CORNELIA HOFFMAN.

A general power to sell real estate given by will to the executors, as such, and not by their names as individuals, is not revoked by the refusal of one of them to act, but survives to, and vests in those who qualify.

Such a power is not revoked by a codicil devising the estate to the executors in trust to make an equal division thereof among the children of the testator and their heirs. When there are no express words of revocation, the provisions in a codicil are never construed as revoking those of the will, unless they are so entirely repugnant that, to give effect to those in the codicil, those in the will must wholly fail.

There is no such repugnancy between a power to sell and a trust or power to divide.

A general power to sell given to executors, includes an authority to sell for the payment of debts; and to the execution of such a power, the rights of devisees and heirs have always been held subordinate; and the power previously given can no more be taken away by a direction to divide the estate than by a devise of the estate itself.

When the power exists for any purpose, a *bond fide* purchaser is protected, no matter for what purpose the power is in fact exercised. A power to sell, and a power to divide, are so far from being incompatible, that the exercise of the former may be necessary to the proper execution of the latter; that is, a sale may be necessary to enable the trustees of the power to make a just and equal division.

Held, in the principal case, that a purchaser from the executors acquired a valid title, disentangled from any trust, and freed from any limitations, created by the will.

Judgment at special term affirmed with costs.

(Before BOSWORTH & SLOSSON, J.J.)

Heard, March 2; decided, May 16.

THIS action was brought to compel the specific execution of a contract relative to the purchase and conveyance of real estate. The contract is set forth in the complaint, and admitted in the answer, and the defendant, as purchaser, refused to perform it,

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on the ground that a good title could not be given by the plaintiffs. The cause was referred to Murray Hoffman, Jun., to take the testimony and report the same, with his opinion thereon. The referee, in January, 1857, made a report, stating all the material facts of the case, and his conclusions of law therefrom. His report and opinion are in these words :—

“To the Judges of the Superior Court:

“The subscriber, to whom it was referred by an order of this Court, made on the seventh of May, 1856, to take testimony as to the validity of the plaintiffs' title to the lands and premises described in the complaint, which are the subject of this action, and to report such testimony with his opinion thereon, reports that he has been attended by the attorneys of the plaintiffs and defendant, and has taken the testimony hereto annexed.

“The following opinion thereon is submitted.

“This action was commenced on the fourth of April last, to enforce the specific performance of a contract.

“The complaint states that on the 26th of January, 1856, the plaintiffs entered into a contract therein set forth with the defendant, to sell to her the house and lot known as number 41 West Eighteenth street, in the city of New York, and on the first of April ensuing tendered to her a warranty deed, properly executed and acknowledged as required by the contract, and demanded of her payment of the purchase money in accordance with its terms.

“The complaint avers that the plaintiffs have good title to the premises, free and clear from all incumbrances, and have complied with every stipulation of the said contract, but that the defendant refuses to comply with or perform the same.

“The answer acknowledges the contract as stated in the complaint, and that the defendant declined to receive a warranty deed in due form tendered to her, on the ground of defective title, which defect is therein stated as follows:

“That the title to the premises was in one James B. Smith at the time of his death, but that said Smith left a will and codicil thereto, making such dispositions of his estate that his executors had not the power to convey his real estate in fee, and make good the title thereto. That they, or some of them, made a deed

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to one Robert Dyson, of the premises in question, on or about the 26th of December, 1829, (through whom the plaintiffs claim;) that such conveyance was not a valid conveyance, but was made to avoid the restrictions in the codicil to the said will, and not *bonâ fide* or legal in any respect.

"The question thus presented for examination is, whether the premises in controversy, the title to which is admitted to have been in James R. Smith, from whom the plaintiffs claim, have been duly conveyed to them, so that they have valid title thereto.

"James R. Smith died in 1817.

"His will was made on the 23d day of January, 1817, and was duly admitted to probate by the Surrogate of the City and County of New York. It is as follows:

"*First*.—I desire that my body may be decently interred in the discretion of my executors.

"*Second*.—I do hereby authorize my executors, hereinafter named and appointed, and the survivor and survivors of them, or such other person or persons who may lawfully obtain the right to execute this my will, in their discretion, to sell in fee simple or otherwise, according to the nature of the estate I may hold at the time of my decease, at public auction, or at private sale, the whole or any part of my said estate, real or personal, and to execute and deliver good and sufficient deeds or conveyances in the law for the same to the purchaser or purchasers thereof, his or their assigns for ever.

"*Third*.—Out of the proceeds of my said estate, after deducting all costs, charges, and expenses that my said executors may sustain, or may be put unto, my desire is that my said executors do pay, as soon as conveniently may be, all my just debts, funeral charges and expenses; and the residue of my estate, unless the same, or any part thereof, shall be otherwise disposed of by codicil or codicils to this my last will and testament, I mean shall be distributed according to the laws of the state of New York, in the same manner as in case I had happened to die intestate.

"*Lastly*.—I do hereby nominate, constitute and appoint Andrew Foster, John Thompson, James Boorman, my wife Hannah Smith, and Matthew St. Clair Clarke, executors of this my last will and testament.

"Of these executors, Andrew Foster neglected to take upon himself the execution of the will. John Thompson and Hannah Smith, the widow of the testator, being dead, the surviving executors, James Boorman and Matthew St. Clair Clarke, by a deed dated December 26th, 1829, sold and conveyed certain premises belonging to the estate of Smith, among which was the lot in question, to Robert Dyson. This conveyance recites that it was made in pursuance and by virtue of the powers of sale in the will, and purports to be made for a valuable consideration paid by Robert Dyson. The son and three daughters of the testator, his only heirs-at-law, with the husbands of the daughters, joined in the deed ratifying and confirming the sale, and releasing all manner of right, title, and interest which any of them had in the premises.

"Were these powers of sale properly executed and exercised in the conveyance to Dyson? A conveyance by executors is not invalidated by the neglect or refusal of any one executor to act. (Laws of 1813, page 366.) Andrew Foster, who thus refused, is to be regarded as if not named in the will; and there is no doubt that powers thus given would continue to the survivors. The authority to sell was to his executors thereafter named, and the survivor and survivors of them, or such other person or persons who may lawfully obtain the right to execute the will. It was given to them not by name, but in their capacity of executors. The law vests the right in the survivors. (Sugden on Powers, page 146, 4 Hill, 493.)

The will itself continues it in them.

As to the exercise of the power, the testimony of James Boorman, one of the executors, (exhibit C) shows that at the time of the sale to Dyson, the estate consisted principally of vacant lots and unimproved lands, there being a claim against it of about \$14,000, which there were no means of paying but by a sale. That the parties in interest under the will agreed upon a valuation of the property, and a portion was sold to Dyson at the valuation put upon it, and that such sale was fairly made, and for the full market value at the time.

The will gives the right of disposing of the property at private sale.

From a view of the will alone, and of the action of the execu-

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tors under it, the conclusion is clear that all the interest of James R. Smith in the lot in question passed, by the conveyance to Robert Dyson.

On the 30th of May, in the same year, the testator executed a codicil to his will, making some modifications of the dispositions of his property, which, it is contended, are repugnant to and revoke the authority to sell.

The codicil sets out with a ratification of the will in the following terms:

"I do hereby ratify and confirm my will in all respects, except so far as any part thereof may or shall be revoked or altered by this present codicil, and in addition to the powers granted in and to my said executors in relation to my said estate, I do now hereby authorize them to lease the same estate or any part thereof, except such as shall otherwise be disposed of in their discretion, and as they shall find the situation of my affairs require."

The only power given by the will being the authority to sell, we would naturally expect explicit words of revocation to withdraw powers so distinctly given and fully confirmed and enlarged; that such a sudden change of intention would be clearly and unmistakably manifested. No such implication will arise from any disposition in a subsequent part of the codicil which can be carried into effect consistently with the exercise of these powers, and can be reconciled with them.

"In examining the codicil, it is considered in the connection with the will, and the two treated as one instrument, and the intent of the testator is to be gathered from the whole; the codicil being no revocation of the will further than such revocation is particularly expressed."

Westcott v. Cady, 5 Johns. Chy. R. 343. *Hone v. Van Schaick*, 3 Barb. Ch. R. 488, Williams' Exrs., page 8.

The provisions of the codicil, so far as it is necessary to recite the same, are as follows:

To the widow is given a portion of the testator's real estate for life, with the right to devise the same to his children, and to sell the same with the consent of the executors, except the homestead, and to enjoy the proceeds for her life; the executors are directed to invest and pay her the income of twenty-five

thousand dollars during her life. They are then further directed to convey other portions of his real estate to certain named devisees, and to sell specified parts for the purpose of raising annuities for the objects mentioned. After making bequests, requiring about \$7,000, the testator proceeds as follows: "All the rest, residue and remainder of my estate, of every kind and nature whatsoever, and wheresoever situate, I give, devise and bequeath unto my said executors, in trust that the same shall be equally divided among my four children, share and share alike, and to their respective heirs. My will further is, that my son James and my daughter Elizabeth shall each have the sum of fifteen hundred dollars set apart by my said executors for their support and maintenance until they arrive at the age of twenty-one; and if that sum shall not be found sufficient, my executors shall take such further sum from their respective shares of my estate as shall be necessary, and I do hereby give the tuition, care and guardianship of my said son James and my daughter Elizabeth to my said wife. My will further is, that my son James shall not come into the full possession and enjoyment of his portion of my estate, until he shall arrive at the age of twenty-five years, nor shall he have the power to pawn, pledge, mortgage or dispose of in any way, the same or any part thereof, before the expiration of that time, but shall be entitled to receive the income arising from his portion between the ages of twenty-one and twenty-five. I further direct, that my daughters Janet, Hannah and Elizabeth, if she should arrive at the age of twenty-one, shall have the privilege of expending and appropriating by and with the consent of the executors, one-third part of their portion of my estate herein devised to them, in such manner as they may think proper, and over which, when so appropriated, they shall have absolute control; and the remaining two-thirds of the portions or shares of my daughters, shall be held separate and distinct, and not liable to the control, debts or engagements of either of their husbands which they now have or may hereafter have, as well those who are married as she who may hereafter marry, giving, however, to the husbands of either or all of them, in case the wife shall die first, either with or without issue, the income of said reserved part of my estate as long as he shall live, arising from his wife's portion, and after his death then to

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the child or children of my said daughter so dying; and if either of my daughters shall die without lawful issue, or having issue which shall not attain the age of twenty-one years and without issue, then the share or portion of my said daughter, after the death of her husband, or if there be no husband living at her death, shall go and be divided among my other children, share and share alike, and to their issue in case of the death of either of them, share and share alike, such issue to take the portion that would have belonged to his, her, or their father or mother."

The foregoing are the chief provisions of the codicil. If there has been a revocation of the powers of sale, it must arise from this disposition of the residue and remainder, there being no express revocation and no other clause affording the least ground for inferring such an intent. Is this such a disposition of the estate by the testator that, (as stated by the answer), the executors had not the power to convey his real estate in fee and make good title thereto?

The natural signification of the language used does not lead to this conclusion.

The will gives the authority to sell the whole or any part of the estate; the codicil ratifies and confirms the will, except so far as the same, or any part thereof, may or shall be revoked or altered thereby, and adds to the authority the right to lease also the estate or any part thereof, except such as shall be otherwise disposed of in their discretion, and as they shall find the situation of his affairs require.

In a subsequent part of the instrument there are specific devises of certain portions of the estate, not including the lot in question, which, so far as those portions are concerned, revokes the authority and gives effect to the exception. To suppose that the testator, after renewing and extending the powers of sale over the estate, had in the same breath rendered them nugatory by otherwise disposing of the whole estate, would be a forced and unreasonable construction, while to confine the meaning of the expression "otherwise disposed of" to those devises, would be in accordance with the principle of attempting to give effect to all the expressions and provisions of an instrument and of seeking to reconcile apparently conflicting ones.

It is a sound rule that the dispositions of a will are not to be

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disturbed by a codicil further than is absolutely necessary to give it effect. (*Kane v. Astor*, 5 Sandford, 467.) The former interpretation would be substantially a revocation of the whole will thus ratified and confirmed, for the only object left for keeping it alive, would be the nomination of executors.

The supposition most naturally arising from the phraseology of the disposition is, that the testator expected the residue and remainder of his estate to be a mixed fund, consisting of the real estate not disposed of by him specifically, and not sold by the executors, together with the proceeds of real estate sold by them in their discretion, and not needed for the legacies and annuities, and that these he meant to blend together for the purpose of division as the whole estate, except specified portions, had been for the general purposes of payment of debts, legacies and other charges.

Where the words of a will, says the Chancellor in the case of *Covenhoven v. Shuler*, 2 Paige, 122, are capable of a two-fold construction, that should be adopted most consistent with the intention as ascertained by the other provisions of the will.

The exercise of the authority to sell as might be for the interest of the estate, is not only not inconsistent with the directions for the division of the residue into shares, but, from the testimony of Mr. Boorman, it would appear to have been necessary to carry it into effect, nor would the sale interfere with the limitations on those shares. The interests of the immediate, and the contingent rights of the executory devisees could be preserved for them more beneficially in this shape.

Throughout the codicil there are intimations of reliance on the discretion of the executors, and of continued confidence reposed in them. The widow is allowed, with their consent, to convert the real estate devised to her into money: each daughter, with their consent, is to have the one-third part of her share, and they are empowered to take such proportion of the shares of the two younger children as they may think necessary to support and educate them.

They are entrusted with the proceeds of portions of his real estate directed to be sold, and other sums of money, the income of which they are to devote to the purposes mentioned by the

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testator, and which, in the contingencies specified by him, are to become part of his residuary estate.

There is no strong inference arising from the greater security of real estate, of an intention that the trust should attach to the land. The testator has shown in other dispositions, his confidence in the judgment and integrity of the executors. If the devisees should lose by any change made in the estate by them, it would be because the testator has chosen to bestow it in the shape the executors might impress upon it, apparently preferring to incur what he must have considered a slight risk, for the sake of having lodged somewhere powers so advantageous in the management of the estate.

From an examination of the other provision of the codicil, in connection with the situation of the testator's family, and condition of his estate, additional evidence is derived of an intention to continue this authority in the executors. (*Irving v. DeKay*, 9 Paige, 521; *Wolfe v. Van Nostrand*, 2 Comstock, 436.)

The estate was chiefly real, consisting principally of vacant lots and unimproved lands: it was largely in debt, and the testator gives annuities and legacies requiring from thirty to forty thousand dollars. These debts and bequests were a charge upon the real estate (*Bench v. Byles*, 4 Maddocks, 187) to pay which it would be necessary to make sales, and from the necessity would naturally be inferred the gift of the power.

Without a sale of part of the property, his daughters, who may be presumed to be the direct objects of his bounty, and for whose maintenance and support he would be most anxious to provide, might not receive any benefit from a gift of this nature; for their shares, thus tied up, and in unproductive property, would either not vest in them at all or only on the happening of a contingency which might not occur for a long period of time.

The division of such an estate into shares, and the subdivision of those shares, would be greatly facilitated by its conversion into money, or by creating from sales a fund out of which to provide for equality of partition.

The expressions used by the testator in denying to his son till twenty-five years of age, the power to pawn, pledge or mortgage his share, and in giving to the daughters the privilege of

expending and appropriating a third part of theirs, and the directions given as to holding the daughters' shares so as not to be liable to the control, debts or engagements of their husbands, show that he must have expected his executors would sell part of his estate, it being almost entirely real.

If it were a question of doubtfully conferred powers, the language of the will and codicil, the dispositions made by them, and the condition of the estate, are such as to strongly imply that the powers of sale were intended to be granted. The supposition becomes much stronger where the authority has been distinctly and clearly given; and not only is there no express revocation, or even intimation of a change of the testator's purpose, but the other provisions are such as to indicate the wish to continue it, and the only disposition from which a revocation can be implied as being repugnant to the authority, can be best carried out without conflicting with it or defeating testator's intentions.

The position that the devise of the residue and remainder, and the limitations thereon, is repugnant to the powers of sale, and that the former, as expressing the latest intention, is to prevail, is untenable.

To render a subsequent provision repugnant to a previous one, the last must be entirely incompatible with the first; so that if effect be given to the last, the other must entirely fail. (*Sweet v. Chase*, 2 Comstock, 73.) Such, as has been seen, is not the case here: even if it were, the general intent distinctly manifested is to be carried out at the expense of the special intent.

4 Kent's Com. p. 597 and notes; *Bradley v. Amidon*, 10 Paige, 235; *Covenhoven v. Shuler*, 2 Paige, 122.

If it be considered as established that the testator meant to subject the whole estate, except the land specifically given to devisees, to the control of the executors, so as to enable them to make sales for the purpose of paying debts and legacies, and of dividing the residue into shares, it would follow that the premises sold by them would be extricated from the trust; and it being undeterminable in whom the interest in the proceeds might eventually rest, to render the sales effectual they must have authority to give full receipts discharging the purchasers.

At the time the sale was made, as stated by Mr. Boorman,

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"The assets of the estate were resolved almost or entirely into real estate, subject to a claim thereon by the estate of the widow Hannah of about \$14,000. That no means existed of paying off the said claim but by a sale of portions of such real estate, nor of ascertaining the value of the residue in order to apportion it into shares in accordance with the provisions of the will of the testator, but by a sale of the whole of the same. That a portion thereof was sold to Robert Dyson, and the parties in interest became purchasers of the residue according to their respective claims on the estate."

The executors were authorized to sell in their discretion, and as they should find the situation of his affairs required. If they, as appears to be the case, considered it requisite to sell for the purposes of division, under the principle of the cases of *Haxtum v. Corse*, 2 Barbour, 506; *Drake v. Pell*, 3 Edwards, 251; *Arnold v. Gilbert*, 5 Barbour S. C. R. 190—"that where conversion is necessary to carry out the testator's wish and prevent injustice, sales, as far as made, worked a conversion," the real estate sold by them would be converted into personal estate, and the distributees, when entitled, would take their shares in the proceeds of the sales as if these shares had been left to them as money.

To these proceeds in the hands of the executors the trust for their benefit would attach, and to them alone must the parties in interest look.

The sale to Dyson to discharge the indebtedness to the estate of the widow, the executors clearly had the right to make.

The debts, legacies, and annuities being a charge upon the real estate, would have to be provided for and discharged before the residue and remainder could be determined and divided.

In the case of *Bradhurst v. Bradhurst*, 1st Paige, p. 331, a testator, after giving his real and personal estate to executors in trust to and for the uses and purposes mentioned in the will, disposed of portions of his real estate, and then directed them to pay certain annuities, and all the rest, residue, and remainder of his real estate he gave to his grandchildren, at twenty-one. The income of the estate was insufficient to pay all the annuities, and it was held that the executors were authorized to sell such part of the estate as would enable them to raise a sufficient sum to purchase the annuities. In that case the whole estate

was given in trust for the purposes of the will, but the testator has in substance done the same thing in the present instance, for a charge is in effect a devise *pro tanto* to pay the debts and legacies. (2 Story's Equity Jurisprudence, § 1131 and notes.) The separation of the real estate from the personal in the gift of the residue, in that case, makes it a much stronger authority in favor of the existence of the power in this.

The power to sell for this purpose must include the right to discharge the purchaser from looking after the application of the purchase-money. Each successive purchaser of the lot in question could not be expected to inquire whether more of the real estate had been sold than was requisite to pay the indebtedness, or if the proceeds of that particular lot had been devoted to that purpose. (Story Equity Jur. § 1131.)

The question has been raised as to the validity of the limitations on the shares of the daughters, whether they are not too remote as depending on an indefinite failure of issue. If they were determined to be illegal, the conveyance of the four children of the testator and the husbands of the daughters uniting with the executors would undoubtedly vest the whole estate in the purchaser; but the title, as based upon the right of the executors to sell, appears from a general survey of the will and codicil to be so fortified and unassailable that it seems unnecessary to seek to strengthen it further, by attacking them. They can stand without conflicting with it.

The conclusion arrived at is, that the codicil has not revoked the powers of sale given by the will; that such powers were properly exercised in the sale of the lot in question to Robert Dyson; and that by their conveyance all the right, title, and interest of James R. Smith, in and to the said premises, were vested in Dyson, who held them disentangled from any trust and unembarrassed by any limitations.

Robert Dyson conveyed this lot with others to Matthew Saint Clair Clarke, one of the executors, and his wife, one of the daughters of the testator, by a clear, absolute conveyance, purporting to be for a good consideration paid by them. The parties to whom they conveyed took from them, not as devisees but as purchasers from Dyson, and cannot be charged with notice of any restriction. Each deed forming a link in the chain of title

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is an absolute conveyance and for valuable consideration, containing no suggestion of any cloud or embarrassment thereon; and by a succession of these, it has come into the hands of the plaintiffs.

The answer of the defendant admits the title to have been in James R. Smith at his death. The Register's searches hereto annexed show that there were no incumbrances on the premises at the commencement of this action.

My opinion therefore is, that the plaintiffs have a valid title thereto.

All which, &c.

January 12, 1857.

"M. HOFFMAN, Jun."

Upon the coming in of this Report, the action was heard at Special Term in February, 1857. Mr. J. DUER, before whom it was heard, gave judgment as follows:

"This cause came on to be heard upon the complaint, answer, order of reference and opinion of the Referee appointed in the action; and after hearing Mr. Edwards Pierrepont, of counsel for the plaintiffs, and Mr. Edward Hoffman, of counsel for the defendant, and due deliberation being had by the Court:

It is ordered and adjudged, that the defendant perform specifically her contract set forth in the complaint and admitted by the answer. That she receive and accept the deed tendered by the plaintiffs of the premises in question; and that she pay unto the plaintiffs the sum of twelve thousand dollars, with interest from the first day of April, 1856. That she execute and deliver to the plaintiffs her bond, secured by mortgage upon the said premises, payable as in the said contract specified, to wit: one thousand dollars on the first day of April, 1857; one thousand dollars on the first day of April, 1858; and twelve hundred and fifty dollars on the first day of April, 1859; with interest on said several sums until paid, to be computed from the first day of April, 1856, and payable half-yearly; said mortgage to be a subsequent lien to a mortgage for ten thousand dollars, to be executed by the said defendant.

And it is further ordered and adjudged, that the defendant pay the costs of this action, taxed with allowance at \$326 18, unto the plaintiffs."

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From this judgment the defendant appealed to the General Term.

E. Hoffman, for the defendant.

Edwards Pierrepont, for the plaintiff.

BY THE COURT. We are entirely satisfied with the Report of the Referee in this case, and with the reasons that he has so fully and ably given in support of his decision. We observe, in addition, that, so far from there being any incompatibility between a power to sell and a power to divide, the exercise of the former may, frequently, be necessary to that of the latter, that is; a sale of portions of the estate may be necessary to enable the trustees of the power to make a just and equal division of the whole, and hence, when a power to sell is not expressly given, its existence, as incidental to that of a division, may reasonably be implied,

CHARLES D. FREDERICKS and others v. CONSTANT MAYER and another.

Whether an injunction may rightfully be issued to restrain a defendant from working, *pendente lite*, for any other person than the plaintiff, in violation of a contract with the plaintiff, is, upon the authorities, a doubtful question, but the precedents in this State seem to be against the exercise of the power. Admitting, however, that the power of granting such an injunction, *pendente lite*, exists, it is certain that its exercise must, in many cases, be a harsh and oppressive proceeding, since it may deprive the defendant of his only means of gaining a subsistence or of supporting his family during the continuance of a litigation that may last for months or years.

There are certain rules that ought to govern a Court of Equity in the exercise of its summary, and in a degree arbitrary, power of granting injunctions, and these rules forbid the exercise of the power where it will operate oppressively or work an immediate injury, or when the right of the plaintiff is doubtful, or the facts are not clearly ascertained. An injunction should not be issued unless the right is clear, and it will not be awarded in doubtful cases, nor in new ones not coming within established principles.

These views ought to govern the Court even upon a final hearing: Much more

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should they be deemed controlling when the application is for an injunction *pendente lite*, and the grounds of the application are controverted and the facts are involved in serious doubt.

Held, that the plaintiff, upon the papers before the Court, had failed to establish a case that could warrant the issuing of an injunction in the present stage of the action. Neither the right, nor the facts upon which he relied, were clearly established.

Order denying injunction affirmed with costs.

(Before DUBB, BOSWORTH, HOFFMAN and WOODRUFF, J.J.)

Heard, May 9; decided, May 16, 1857.

THIS action comes before the Court, at General Term, on an appeal by the plaintiffs from an order made on the 9th of March, 1857, by Mr. JUSTICE HOFFMAN, dissolving a temporary injunction, and denying a motion for its continuance *pendente lite*.

The following are the material facts of the case, as collected from the pleadings and the affidavits of the parties.

The bill of complaint was filed to restrain the defendant, Mayer, from painting photographic likenesses, &c., for any person or persons other than the plaintiffs, and to recover damages for his alleged breach of contract with the plaintiffs to work for them.

It alleges that the plaintiffs are partners, carrying on business together as photographers in Paris, under the firm name of Fredericks, Penebert & Le Blanc, and in the city of New York, under the name of Charles D. Fredericks, and that as such co-partners they entered into a contract with the defendant, Mayer, on the 2d day of June, 1855, at the city of Paris, whereby they agreed to pay his expenses to New York, and to employ him there for the term of three years, at a salary named, and that he agreed to work as an artist, painting, &c., "for the house of New York," and "not to work for any other house or person during the term of the contract, excepting Fredericks, Penebert & Le Blanc," and that he would proceed to New York, and place himself at the disposition of Mr. Fredericks for the said term of three years.

That the defendant, Mayer, in pursuance of the said contract, came to New York and entered into the service of the plaintiffs, and remained in their service, under the direction of the said Fredericks, until about the first of September, 1856, when he left their service and entered into the service of the defendant, Gurney,

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for whom he is now performing similar work, &c., and that the defendant, Gurney, when Mayer went into his employ, knew of the existence of the contract between the plaintiffs and Mayer.

The defendant, Mayer, by affidavit, admits the making of the contract, but denies that it was performed on the part of the plaintiffs, or that he, in fact, ever entered into their service; on the contrary, he states that on his arrival in New York he found that he had been deceived,—that he then found that the plaintiffs had no “house” in this city, and that said firm had no existence here—but that the defendant, Fredericks, had previously entered into partnership with the defendant, Gurney, under the name of Fredericks & Gurney, who were carrying on the business, and that he would not have left Paris but for his reliance upon the representations and his belief that the plaintiffs had an established house in New York,—that being wholly dependent upon his profession for support, and his family and parents dependent upon him, and the plaintiffs not employing, nor offering to employ him, he entered into the employ of the firm of Gurney & Fredericks, and continued to work for them (for upwards of one year) until their partnership was dissolved, about the 1st of August, 1856, and received his salary solely from them.

That after the dissolution of the firm of Gurney & Fredericks, he entered into an agreement with Gurney to work for him, and is satisfied of the ability of Gurney to pay his salary, which it is absolutely necessary that he should receive regularly for the support of himself and his parents, and that he does not feel satisfied of the solvency of the said Fredericks.

The defendant, Gurney, by his affidavit, states that eighteen months prior to the contract with Mayer he entered into partnership with Fredericks, and that the other plaintiffs were not engaged in business with him.

That he advanced to Fredericks, for the use of the firm, five hundred dollars, on Fredericks' representation that that sum was necessary, to be deposited in Paris, as security, to engage artists for the partnership to color photographs, and also advanced the money to pay the artists' expenses to this country, and that Mayer, and other artists came to this country and entered into the employment of the firm of Gurney & Fredericks, and that he supposed the contracts were made with them in the name of

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the firm of Gurney & Fredericks, but the contracts being in French he could not read them, and, in fact, he says he did not see them till shortly before the dissolution of that firm.

That the plaintiffs never had any place of business in New York until after such dissolution; That Fredericks was bound by their agreement of co-partnership to give his undivided attention to the business of their firm, and he avers that the contracts in question were drawn wrongfully, and with intent to defraud him, in the name of the plaintiffs; that Mayer was, in fact, always in the employ of Gurney & Fredericks, who paid his expenses to this country, and his salary.

Both Mayer and Gurney also refer to an agreement, or consent, signed by Gurney and by Fredericks, giving Mayer permission to go to Philadelphia (where he worked for the firm of Fredericks, Penebert & Germon), to return whenever they, Gurney & Fredericks, should desire it, and stipulating that "the contract between Mr. Mayer and ourselves will not be affected by this absence." Under this permission Mayer was absent about one month.

The plaintiff, Fredericks, to repel these affidavits, states that the plaintiffs, Fredericks, Penebert & Le Blanc, never had any connection with Gurney, nor were co-partners with him, but that as between him and Penebert and Le Blanc he accounted for one-half of his share of the profits of the business of Gurney & Fredericks; He does not allege that the plaintiffs, in any other manner, had any house or place of business in New York.

He does not deny that the money was advanced, as stated by the defendant, Gurney, and that the artists entered into the employment of the firm of Gurney & Fredericks, and continued in their employment until the dissolution of that firm.

Various other facts of minor importance are stated in the affidavits of the parties, and other affidavits read on the motion, and in many particulars there is direct conflict between the affidavits produced, and particularly upon the question whether Gurney knew, during the continuance of the partnership, and when the artists entered into their employment, in whose names the contracts were drawn; and as against the defendant, Gurney, the plaintiff, Fredericks, insists that he was to produce the artists and allow them to work for Gurney & Fredericks, while they

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continued together, and that, having the disposal of them himself, he has a right to retain them in his own service.

A. R. Dyett, for plaintiffs, relied principally on *Lumley v. Wagner*, 13 Eng. L. & Eq. R. 252.

F. Howland, for defendants, cited the cases in our own Courts, 4 Paige, 264. 2 Edw. Ch. R. 529; 1 Barb. S. C.R. 315 as proving that the Court had no power to grant an injunction.

BY THE COURT. WOODRUFF, J.—The question argued at some length before us on this appeal is, whether the Court will interfere by injunction to restrain a breach of a contract for personal services of the description mentioned in the complaint.

Although it is conceded that the Court cannot, by its decree, compel an artist to employ his skill in his art for the plaintiffs' benefit, it is nevertheless insisted, that where the contracting artist has agreed that he will not work for any other person, the Court will do all that it can to enforce performance by enjoining the artist not to work for any other than the plaintiffs. Various authorities are referred to, as showing the validity of such an agreement, and in support of the authority and duty of the Court to interfere by injunction. The case of *Lumley v. Wagner*, (1 De Gex, McNaughten & Gordon, 604; 13 Law & Eq. R. 252,) is mainly relied upon, with the cases therein cited.

On the other hand, it is insisted that an injunction should not issue to restrain a defendant from rendering services to another, when it is clear that the court cannot, by its decree, compel a performance of the affirmative covenant to work for the plaintiffs. That the injunction is only granted as auxiliary to the execution of the decree, and where the decree can itself be enforced; and that the Court will not attempt to compel the specific performance of an agreement to render personal services, but will leave the party, complaining of a breach, to his remedy at law. And to these points, *Morris v. Coleman* (18 Ves. 437), *Clarke v. Price* (2 Wils. Ch'y R. 157), *Kemble v. Kean* (6 Sim. R. 333), and *Baldwin v. Soc. for Diffusing Useful Knowledge* (9 Sim. R. 393)—in England: and *De Rivafinoli v. Corsetti* (9 Paige, 264), *Hamblin v.*

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Dinneford (2 Edw. Ch. R. 529, and *Sanquirico v. Benedetti* (1 Barb. S. C. R. 815)—in this State, are cited.

Although the precedents in this State, so often as the question has arisen here, seem to be against the plaintiff, we do not think it necessary, and it is therefore, in this stage of the cause, perhaps improper to decide this question.

The appeal may be disposed of upon the grounds which appear in substance to have governed the decision of the motion at the Special Term.

The motion is for an injunction *pendente lite*. It is a harsh and, may be, an oppressive exercise of the power of the Court, operating to deprive the defendant of the means of gaining a subsistence, and of the ability to support his family, while the litigation is going on, which may continue many months, and in a case in which the right of the plaintiffs is denied.

The frequency of applications for injunctions, *pendente lite*, and, I may add, the facility with which they are obtained, may properly induce us to recur to some familiar rules which ought to govern the Court in the exercise of its summary and, in a degree, arbitrary power; it should be guarded by a most cautious discretion, forbidding its exercise when it will operate oppressively or work immediate injury, or where the right of the plaintiff is doubtful, or the facts are not clearly ascertained. It has been well said, that "there is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or is more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of Equity, which ought never to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, * * * and it will not be awarded in doubtful cases, nor in new ones not coming within well-established principles." (Mr. Justice Baldwin in 1 Bald. Cir. Ct. R. 218; note to 2 Story's Eq. Jur. § 959 b.)

These views should govern the Court on a final hearing, and with all the proofs necessary to a final decree before them. Much more should they control us on an application for an injunction *pendente lite*, while the grounds of the application are controverted, and the facts involved in serious doubt. Even in the case relied upon by the plaintiffs' counsel it will be seen,

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by a recurrence to the case then before the Court, it was deemed that there was no doubt of the rights of the parties upon the evidence.

However, then, the present case may hereafter appear, when the proofs shall be produced upon the trial, and whether the Court may or may not be brought to conclude that an injunction may be issued to restrain the breach of the defendant's covenant not to work for any other than the plaintiffs, it must suffice for the purposes of this appeal to say, that the papers before us do not establish such a case as warrants the granting of this summary and harsh remedy in the present stage of the action. Neither the right nor the facts are clearly established in the plaintiffs' favor.

Without entering into any minute detail in regard to the various matters wherein the affidavits are conflicting, we think that if the balance of evidence does not establish, it creates a strong probability, that the contract with Mayer was itself a fraud upon him, in holding out that the plaintiffs had a house or firm in New York, and were carrying on business here, and that he was to have employment with them in such firm, when, in fact, no such firm existed here, and Fredericks was already in partnership here with another, (the defendant, Gurney,) and therefore that the agreement did not bind Mayer at all. And if it be suggested, that, by the contract, Mayer placed himself at the disposal of the plaintiff Fredericks, the answer is furnished by the contract itself, which limits that disposal to working for the plaintiffs' house in New York. And if the acts of the parties, Fredericks and Mayer, may be regarded as showing that working for Gurney and Fredericks was within the purview of the contract, as mutually understood and intended, it is answered, plausibly, at least, that Gurney & Fredericks, being the only house in New York in which either of the plaintiffs had any interest, placing the defendant, Mayer, with them, may be regarded as a practical exposition of the contract, designating that house as the house in New York for whom he was to work in New York; and therefore, that upon the dissolution of that firm, the obligation ceased, because he could work for them no longer. This exposition of the contract finds strong support in the paper signed by Fredericks himself, in which the contract is distinctly recognised as a

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contract between Mayer and Gurney & Fredericks, very clearly indicating, that, whether in their names or not, it was a contract for their benefit.

The doubts in favor of the defendant, Gurney, are even greater. It is not denied that the firm of Gurney & Fredericks existed long before the contracts with the artists were made; that Gurney advanced the five hundred dollars to secure the employment of the artists; that he paid their expenses to this country; that they entered into the employment of the firm and so continued until the dissolution, and were paid by the firm. Although there is contradiction on the subject, we are not satisfied that the making of these contracts with the artists, in other names than that of the firm, was with his knowledge or assent. If, in this respect, there was not a purposed deception, it at least appears that the contracts were for the benefit of the firm, and were so treated and so regarded, by both Fredericks and Gurney, until their interests became hostile, and Fredericks was about to establish a rival business. The inference from the papers before us is by no means slight nor feeble, that the whole enterprise of bringing the artists to this country originated with Gurney & Fredericks; and, the whole advance being made by Gurney on their account, with the expenses resulting from the enterprise, that the engagement with the artists, as between Gurney and Fredericks, was for the sole benefit of that firm, and therefore subject to the usual incidents of a dissolution of the firm, in which case Fredericks could not equitably claim any exclusive interest in the contracts, or sole control over the employees.

I am aware that there are many statements, on the behalf of the plaintiffs, that are relied upon as weakening the inferences above intimated, and that there are many particulars in which there is a conflict of evidence; but the general result, in its influence upon our minds, is sufficiently indicated by what has been said. In this statement, it is not designed to say that these views, so favorable to the defendants, are decisively established. It is enough to say that upon the merits, the plaintiffs' case is involved in great doubt, and, I may add, that the scale seems to incline in the defendants' favor.

After what has been suggested, in regard to the propriety of granting an injunction under such circumstances, it only remains

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to add, that we think the discretion of the Court at special term was wisely exercised, and that the order appealed from must be affirmed.

Order affirmed.

A. HEALY and J. REDDINGTON, Executors of N. GILMAN,
deceased, v. W. W. GILMAN.

A bank check, in the hands of the drawer, paid by him, is not evidence, *per se*, of a debt due to him from the payee; but when it is shown that the check was in fact lent to the payee, it may be read in evidence to prove the amount of the loan. A draft, in the hands of an acceptor, and paid by him, is not evidence of a debt due to him from the drawer; but on the contrary, the presumption of law is, that the draft was drawn against funds of the drawer, then in his hands. In order to charge the drawer of a bank check, it is not necessary to show presentment for payment and refusal, if it is proved that, at the time, he had no funds in the bank upon which the check was drawn. When an account has been rendered to a defendant which, on the trial, he refuses to produce, and which, it appears, was transcribed from the ledger of the plaintiff, the account in the ledger is good secondary evidence. But when no reason is shown for not producing the ledger, a copy of the account taken from the ledger cannot be received, as it is plainly not the best secondary evidence which, the plaintiffs had it in their power, to give. The American cases have established that there are grades in secondary evidence, and the true rule deducible from them is, undoubtedly, that laid down by Mr. GREENLEAF; namely, "That, if from the nature of the case itself it is manifest that a more satisfactory kind of secondary evidence exists the party will be required to produce it, but when the nature of the case does not disclose the existence of such better evidence, the objector must prove its existence, and must also prove that it was known to the other party in season to have been produced on the trial."

The referee in this cause, overruling the objection of the counsel for the defendant, had admitted in evidence a copy of an account, taken from a ledger, admitted to be in the possession of the plaintiffs, as proof of the contents of an account which, it was alleged, had been rendered to the defendant.

Held, that the evidence ought not to have been received, and that, for this error, the judgment upon the report of the referee must be reversed, and a new trial ordered. Costs to abide event.

(Before DUNK, BOSWORTH, and SLOSSON, J.J.)

Heard, March 9; decided, May 16, 1857.

THIS action comes before the Court at General Term, on an

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appeal by the defendant from a Judgment at Special Term, entered upon the Report of a referee, in favor of the plaintiff. The judgment, including costs, was for \$24,709 78.

The following is the report of the referee:

To the Justices of the Superior Court of the City of New York:

In pursuance of an order of this Honorable Court, made in the above entitled action, bearing date on the 3d day of November, 1855, by which it was ordered that the issues joined in this action be referred to me, the subscriber, to hear and decide the same, and report thereon to this Court, I, James Maurice, Referee as aforesaid, respectfully report:

That I have been attended on the reference under the above recited order, at my office, No. 67 Wall Street, in the City of New York, by the counsel for the plaintiffs and defendant, respectively, and have heard and considered their proofs and allegations; I do further find and report the following facts:

That Nathaniel Gilman and Nathaniel Gilman, Junior, were copartners in business, under the firm of Nathaniel Gilman and Son.

That the partnership of Nathaniel Gilman and Son had various dealings and business transactions with the defendant, commencing on or about the tenth day of December, 1846, and continuing until on or about the thirtieth day of November, 1852.

That the first transaction was a loan of the sum of six hundred dollars, on December 10th, 1846, by the firm to the defendant, and that all the subsequent transactions (except a sale of leather, August 28, 1848, amounting to \$34 91, by the firm to the defendant,) were loans or advances of money by the firm to the defendant, or for his use, at his request, and credits of sums received in various amounts, at different times, from the defendant or from the avails of negotiable paper transferred by him to the firm, or collections by the firm of amounts due on sales made by defendant, of leather, belonging to him.

That the items composing these different credits are contained in the account current annexed to the complaint in this action, and that independently of the admissions in said complaint, no proof whatever in support of such credit items was produced to or made before me.

That the debit items in said account current, (except balances

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for interest,) were established by proof, and the credit items, by the said admissions in the plaintiffs' complaint.

That Nathaniel Gilman, Junior, died on or about the 17th day of February, 1853, leaving a last will and testament, whereby he appointed the plaintiffs (and another person who did not qualify,) his executors; and that letters testamentary were granted to the plaintiffs on or about the 10th day of March, 1853.

That an account current was rendered to the defendant by the said Nathaniel Gilman, as such surviving partner, in the month of March or April, 1853; that the account so rendered, corresponded with the said account annexed to the plaintiffs' complaint, except in one credit item in defendant's favor, amounting to \$672 71, due November 4, 1852, which item was not contained in the account then rendered to said defendant; that the defendant afterwards, on the same day the account was rendered, and on two other occasions shortly thereafter, disputed the correctness of such account in general terms, but did not at any time specify or point out any particular item or items which he thought wrong, except once, when he made a specific objection to a single item; that the defendant was mistaken in respect to the item objected to by him, and the account in this particular was correct; and that no objection was made by the defendant at any time to the mode in which the interest is reckoned and computed in such account.

That the account rendered (including the credit item omitted from it) exhibited a balance due from the defendant on the 28th day of February, 1853, to the firm of N. Gilman and Son, of nineteen thousand four hundred and thirteen dollars and ninety-one cents.

That Nathaniel Gilman, surviving partner of such firm, on or about the ninth day of July, 1855, duly sold, assigned, transferred, and set over unto the plaintiffs the demand in controversy in this action, and that the said plaintiffs are now the lawful owners thereof.

Upon these facts, I am of opinion and do find and report that the plaintiffs are entitled to judgment against the defendant for the said sum of nineteen thousand four hundred and thirty-one dollars and ninety-one cents, with lawful interest thereon, from

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the twenty-eighth day of February, 1853, and which amounts in the aggregate at the date of this report to the sum of twenty-three thousand seven hundred and ninety-two dollars and twenty-one cents, and are also entitled to their costs in this action, including a suitable allowance.

All which is respectfully submitted.

Dated New York, May 12th, 1856.

JAMES MAURICE,

Sole Referee.

To this report and decision, the counsel for the defendant duly excepted. It is not necessary to state at large the evidence before the referee. It will be sufficient to state the exceptions that were taken by the defendant's counsel, in the course of the trial, and which were argued and decided upon this appeal.

The plaintiffs having called upon the defendant to produce an account rendered to him, and the same not being produced, a witness for the plaintiffs testified as follows. "I have drawn off a copy of the account, as it now appears in the books of N. Gilman & Son, this is it: (witness produced a paper writing.) It is a true copy from the books of N. Gilman & Son. I believe it to be an exact copy of the account defendant received, and had in his hands, with the exception of one item; both accounts were made from the same account in the ledger; that item is a credit item of net sales of 397 sides of leather, amounting to \$672.71, due Nov. 4th, 1852. It is not dated; that item was omitted, on account of its not being posted in the ledger at that time. I have not a doubt that this account is a copy of the one rendered." Thereupon plaintiffs' counsel offered in evidence the paper writing so produced by the witness. The counsel for the defendant objected to the admission of the same, on the ground that it was not the best secondary evidence, which it was in the power of the plaintiffs to produce.

The referee decided that the said paper writing was admissible, to which decision the defendants' counsel duly excepted. When the plaintiffs rested, the defendants' counsel made the following motions, each of which was denied by the referee, and to each decision the defendants' counsel duly excepted.

1. A motion to strike out, as not supported by evidence, all

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the items, to prove which, checks of Nathaniel Gilman & Son had been produced without explanation.

2. A motion to strike out, as not supported by evidence, all the items, to prove which, checks of the defendant had been produced.

3. A motion to strike out, as not supported by evidence, all the items, to prove which, drafts drawn by defendant on N. Gilman & Son had been produced.

4. A motion to strike out, as not supported by proof, all the items of interest.

5. A motion to strike out, all evidence, as to the account alleged to have been rendered to defendant.

6. A motion to strike out, as not supported by evidence, all items, as to which, no evidence had been adduced, other than the alleged rendering of said account.

E. West, for the defendant, appellant, contended that the finding of the referee upon the facts, was not supported by the evidence, and that all the exceptions taken on the trial, ought to have been allowed.

E. H. Owen, for the plaintiff, respondent, insisted that the report and decision of the referee, were in all respects correct, and that the judgment below, ought to be affirmed with costs.

BY THE COURT. SLOSSON, J.—The action is brought to recover a balance of account alleged to be due from the defendant, to the late firm of N. Gilman & Son, which was dissolved by the death of N. Gilman, Jr., to whose executors, the present plaintiffs, the claim was assigned by the surviving partner of the house.

The referee to whom the case was referred, has reported a balance, including interest to the date of his report, of \$23,792 21.

The transactions between the parties extend over a period, from December, 1846, to February, 1853, at which time N. Gilman, Jr., died. These consisted of loans made by the firm to the defendant, of sales of leather consigned by him to them, and of the discount, by the firm, of notes held by him. Such discounts appear to have been made by checks. No loans appear to have been made by the defendant to the firm.

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Soon after the dissolution of the firm, an account was rendered by the surviving partner to the defendant, setting out the entire transactions between the parties, from December, 1846, to February, 1853, and it was claimed, at the trial, that this account had been acquiesced in, and that it had the effect of an account stated.

The plaintiffs do not seem to have relied upon this as wholly sufficient to establish the case, for, in addition to the evidence of the rendering of the account, they attempted to establish a great portion of the debit items of it, by independent proof.

The witness, to prove these items, was a Mr. M'Clellan, who had been a book-keeper in the firm up to 1850, and then, after an absence of nearly three years, returned to its employ, where he continued to the period of its dissolution.

To a large number of the items proved by him, no objection is made, but in respect to others the evidence is objected to, as incompetent or insufficient. The evidence in respect to these latter items consists, first, of the checks of the firm to the order of, and endorsed by the defendant, covering nearly \$9,000, in amount, and extending over a period, from December 20, 1850, to September 27, 1851; second, two drafts drawn by the defendant on the firm, amounting together, to \$1,000; and third, two checks of the defendant, amounting together, to \$2,820. There is then a series of charges, of over \$2,000 in amount, of which the only, or principal evidence, is the account rendered.

In respect to the checks of the firm, it is objected that they are, in themselves, no evidence of money loaned, but only of money paid, and that the presumption is, that they were paid in discharge of a debt. A check is certainly not evidence in itself of a loan, but under certain circumstances it may be good evidence for that purpose, and we should be disposed to think, were there no other question in the case, that the referee, under the evidence, was justified in considering them proof to this point.

In respect to the second objection, that of the admissibility of the defendant's drafts on the firm, as evidence of a debt on his part, we are clear, that it is well taken. Apart from the account rendered, these drafts furnish no evidence of an indebtedness.

The presumption is, that they were drawn on funds, in the hands of the firm, belonging to the defendant.

It would appear from the account, that the firm had received leather for sale, from the defendant, at different times, as there are credits on account of such sales. In the account, if properly made up, these drafts would be proper debits; but standing by themselves, they furnish no evidence of debt against the defendant.

In respect to the two checks drawn by the defendant, it is objected, that there is no proof that they had been presented for payment and that payment was refused. We think it a sufficient answer to this, that the defendant kept no bank account at the period when these checks were drawn.

The principal piece of evidence on the part of the plaintiffs, however, and on which they chiefly rely to sustain their case, is the fact, that an account was rendered to the defendant in the spring of 1853, immediately after the dissolution of the firm, by the death of N. Gilman, Jr., in which, as is claimed, the defendant acquiesced.

It appears that the firm had been in the habit of rendering yearly accounts to their customers, and as I should infer from the evidence, to the defendant, in which interest was included.

At the period referred to, a statement of the entire account was transcribed from the ledger, covering the whole period of the parties' transactions with each other, and rendered to the defendant.

Three questions are raised in respect to this account. First, as to the proof of the account itself; second, as to the defendant's acquiescence in it; and third, as to the liability of the defendant for interest, charged in it.

The first is the material question, in the view we take of the case.

The defendant being called upon, on the trial, to produce the original account rendered, declined to do so, and the clerk who made out the original account from the ledger, of which it was a mere transcript, then produced another transcript from the ledger, of the same account, which he appears to have drawn off for the purposes of the trial; and the same was offered as evidence of the contents of the account which had been rendered. The witness swore it was a true copy from the books, and he had not a doubt that it was a correct copy of the one rendered, with

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the exception of one item of credit, which did not appear in the account rendered; because the item had not been then posted in the ledger. The ledger was not in court, nor was any offer made to produce it in lieu of the copy, nor was the copy read, on the ground of convenience, with an offer to produce the book for the purpose of comparison, or as a substitute for the copy, with an offer to produce that, if required. But the new transcript was offered as, in itself, competent evidence of the contents of the original account, after the refusal of the defendant to produce the latter.

It was objected to, on the ground, that it was not the best secondary evidence which it was in the party's power to produce; but it was admitted under an exception to the ruling.

I do not mean to contend that there are any arbitrary or inflexible degrees of secondary evidence, rendering it necessary for a party, who is driven to that description of proof, to show affirmatively, in every instance, that there is no higher degree within his power, than the one he offers; but I think it may be safely said, that where it appears in the very offer, or from the nature of the case itself, or from the circumstances attending the offer, that the party has better and more reliable evidence at hand, and equally within his power, he shall not be permitted to resort to the inferior degree first. As a general principle, the law requires the best evidence within the party's power to produce; and I see no reason why this rule should not equally apply to secondary as to primary proof. There is this difference, it is true, between the two classes of proof: primary proof is necessarily single in its character, while all below it, admits of a wider range, and the fact may be established by a variety of evidence, as, for example, the contents of a lost paper may be established by a sworn copy made at the time, or by a rough draft, or by mere recollection; but it does not follow that all distinction between these kinds of proof is to be disregarded, and that they are all on a level, and it will hardly be contended, I think, that a witness would be allowed to prove the contents of a lost paper by recollection, when he had in his pocket a sworn, or even an unsworn copy made by him at the time the paper in question was written. In the *U. S. v. Britton* (2 Mason, 464), where the contents of a bank check—for the alter-

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ation of which the defendant had been indicted for forgery—was proved by the recollection of a witness, the original check having been destroyed by the defendant, Judge STORY held, that the rule was universal, both in criminal and civil proceedings, that the best evidence was to be produced which the nature of the case admitted of, and that if an original instrument was lost, or in the possession of the adverse party, and he refused to produce it, an examined copy, if such existed and could be found, was the next best evidence, and must be produced; but if no such copy existed, then the contents of the paper might be proved by witnesses who had seen and read it, and could speak pointedly and clearly to its tenor and contents.

In *Hills v. Colvin* (14 J. R. 182) a witness for the plaintiff was objected to as incompetent, on the ground that he had been convicted of a felony, and the proof of the conviction was by the parol testimony of a witness, after it had been shown that the office of the clerk, in which the record of conviction would have been found on file, had been burned down and its contents destroyed. It was objected to the admission of the proof, that by statute, the District-Attorney was required to certify a transcript of every conviction to the Court of Exchequer at the next term, there to remain on record, and that this transcript should be produced, as better evidence than the mere parol testimony of the witness. The Judge admitted the evidence and excluded the plaintiff's witness, in consequence of which he was nonsuited. The Court above reversed the judgment, on the ground that the transcript, which must be intended to be remaining in the Court of Exchequer, was "higher proof, in the power of the party, than that given in the Court below."

In a note to § 84 of 1 Greenleaf on Ev., the author says, that the result of the American cases seems to establish the rule to be, that "if, from the nature of the case itself, it is manifest that a more satisfactory kind of secondary evidence exists, the party will be required to produce it; but where the nature of the case does not, of itself, disclose the existence of such better evidence, the objector must not only prove its existence, but must also prove that it was known to the other party, in season to have been produced at the trial."

There are several admitted grades of proof in respect to the

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contents of a lost deed, as first, a counterpart, if there be one; if no counterpart, then a compared copy; and if no copy, then an abstract or parole evidence; and it seems that evidence of a mere copy would not be admitted, until it had been shown that the counterpart could not be produced. (Starkie Ev., Part 2, 354-5; 2 Atk. 71.)

Where the proof offered is of the same grade, the distinction of degrees ceases, as where the contents of a lost letter, of which no copy exists, is to be proved by the mere recollection of witnesses, the testimony of one who had read and remembered the contents, is as good as that of one who wrote the letter. (*Ditto*, *ditto*, 357.)

In England, the rule as to secondary proof, seems of late years to have been much relaxed. In *Brown v. Woodman*, 6 C. & P. 206, it was ruled at *Nisi Prius*, by PARKE, Justice, that there were no degrees of secondary evidence, and he allowed the contents of a letter, which the defendant had written to the plaintiff, and which the plaintiff declined to produce under a notice, to be proved by the oral testimony of a witness, though the defendant had kept a copy of the letter; but, he said, if there had been a duplicate original, it might have been different.

In the case at bar, the evidence offered, is not a compared copy of the account rendered, or a duplicate of that account (in either of which respects, the book from which it was taken may well be regarded, and which would be the next best evidence to the original itself); but it is a copy of such copy. In swearing to such last transcript, therefore, as a correct copy of the account rendered, the witness is, in reality, swearing only to the accuracy of it, as a transcript from the book, or, argumentatively, as a copy of the account rendered, because the latter was also taken from the book.

We think it would be dangerous to hold such evidence admissible. If in the case of a lost deed the party should attempt to prove its contents by producing a copy of a counterpart, or of an examined copy of the deed, and which copy so offered he had made for the purposes of the trial, while the examined copy, or counterpart itself, was admitted to be in his possession, and could be produced, would he be allowed to do it? Clearly not. Is there any difference in principle in the case of a party refusing to

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produce, on notice, an original paper, of less solemnity than a deed? Does such refusal justify a looser kind of secondary evidence, on the part of the party calling for its production, than in the case of a lost instrument? Is it difficult to perceive why. It is said the party who refuses to produce the original, cannot complain that the other resorts to evidence of an inferior nature to that which he has it in his power to produce, because, having the original in his possession, he has the means of correcting any defect in the proof—but this will not always hold good; for it often happens that the original is not produced, because the party called on to produce it, may not have the actual possession or control of it at the time, or may have good and proper reasons for not producing it. The law can look only to the end to be attained, and that is, the truth, by the best and most reliable testimony.

However satisfactory the evidence may have been to the referee, we think in face of the admitted fact that better evidence was present, and might have been resorted to, the transcript from the ledger, should not have been admitted as evidence of the contents of the account rendered.

This will render a new trial necessary.

It is unnecessary to express any opinion upon the question; how far the evidence sustains the finding of the referee, that the defendant acquiesced in the account as rendered—but it may be proper to say, on the question of interest, that it appearing to have been the practice of the firm to make up annual accounts, charging interest, and this custom known to the defendant during his dealings with them, and it further appearing, though not, I admit, very clearly, that annual accounts, made up in this manner, were rendered to the defendant, and there being no evidence of his ever having objected to the charge of interest, it is a reasonable presumption that he dealt with the firm, on the understanding that he was to pay interest, and assented to it. (*Esterly v. Cole*, 8 Com. 502.)

There should be a new trial, costs to abide event.

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J. & R. MILBANK & Co. v. A. DENNISTOUN & Co.

The plaintiffs, at New York, in June, 1846, shipped to the defendants, at Liverpool, 5,000 bbls. of flour, per "N. Biddle," and 3,000 per "Georgianna," for sale, and by letter of June 25th, 1846, said, "You will please make no disposition until we give you our wishes, per 'Caledonia,' unless 22s. in bond is attainable, in which case, if, in your judgment, you deem it our interest to accept that sum, please to do so." On the 27th of June, 1846, per steamer "Caledonia," the plaintiffs wrote to defendants thus: "We fear the first introduction for consumption may tend to continue low prices, as they will probably be large immediately on the passage of the new bill." (Meaning, by the new bill, the British Corn Law Bill, reducing the duties on foreign breadstuffs, then before Parliament, which received the royal assent on the 27th of June, and went into operation three days after.) "Believing that after the stocks now in bond shall have been reduced by consumption, &c., that an improvement may ensue, we would express our desire that these parcels may be withheld from the market, until the operation of the new law shall have produced its results. We hope we may not err in assuming its passage; though, if 22s. in bond is attainable on arrival, and you think our interest dictates such sale, please so dispose of it." The defendants received this the 12th of July.

By a letter of the 31st of July, and received by the defendants on the 12th of August, 1846, the plaintiffs say: "We suppose that ere this the crop of wheat has been ascertained, as to its probable yield, and the grain and flour conformed to such result. We therefore ask you to exercise your discretion in effecting sales for us." On the 4th, 5th, and 7th of August, 1846, the defendants sold the "N. Biddle" flour, at prices which produced \$2 17 per bbl. net, being out of bond, and the duties on it having been paid.

The defendants advised the plaintiffs of such sale, by a letter dated the 18th of August, 1846, in which letter the defendants said that,— "After writing you on the 3d inst., we were induced, by the continued fine appearance of the season, to sell your flour by the 'Nicholas Biddle' at 21s., as per note above; and this we now regret, as on the 11th or 12th inst., a great change took place in the weather, and the potato crop was completely blighted."

The flour, per the "Georgianna," being of the same quality, was sold at later periods, and at prices which would have made the flour, per the "N. Biddle," produce, with interest to the day of trial, \$14,530 29 more than the plaintiffs realized from it. In an action to recover this sum as damages, on the grounds that such a loss had been sustained by reason of the defendants disobeying the orders given to them, and by reason of their negligent performance of their duty, as such factors and agents, it was *held*,

1. In determining the question, whether the defendants violated their instructions, in selling at the time they did, the letters of the 25th and 27th of June are the only letters to be considered, to ascertain the precise instructions under which the defendants were then acting, as they had then received no others which gave any.

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2. The letter of the 27th of June is not fairly susceptible of two interpretations, and it is the duty of the Court to construe it, and declare its meaning.
3. As 22a, in bond, could not be obtained, on arrival of the flour, it was the duty of the defendants to withhold the flour from market until the stock in bond, on the passage of the Corn Law, had been reduced by consumption, &c. If it was sold before that, it was sold before the defendants were authorized to sell, and they are liable for the consequences of that act.
4. It was the right and duty of the defendants, after the stock, then in bond, had been introduced into the market, and had been reduced by consumption, &c., to determine, in the exercise of good faith, and of proper care and diligence, whether, and when, the Corn Law had produced its results, and also to determine, thereupon, when their duty and the interests of the plaintiffs required them to sell, acting under such instructions.
- If they did not sell until after such introduction and reduction, they are not liable, unless they failed to exercise the care and diligence which a prudent consignee, acting on his own account, and with the knowledge or information which the evidence shows they possessed, would have exercised.
5. If they failed to exercise that care or diligence, or disobeyed their instructions, as above explained, in selling before the change in the market, of which they speak in their letter of the 18th of August, they are liable. If they did not do either, they are not liable. If they did do either, they are liable.
6. After the change in the market, mentioned in that letter, it was their duty to act with reference to the interests of the plaintiffs; as they would be affected by that change and the causes that produced it.
7. Under the letter of the 31st of July, and received on the 19th of August, 1846, the defendants were bound to exercise good faith, and reasonable care and diligence—such care and diligence as a consignee, of ordinary care and prudence, not coerced by any necessity to sell, and acting on his own account, would have exercised under the same circumstances. Whether they exercised such care and diligence, was a question of fact, to be determined by the jury. If they failed to exercise it, in selling when they did, they are liable.
8. To ascertain the damages which the defendants are liable to pay, if liable at all, the jury must, upon a consideration of all the evidence bearing upon the questions, at what time the market prices began to advance, what continued to be the tendency of prices, and what must have been the views of men of prudence, having such information as the defendants had, and acting with reasonable care and diligence, as to the time when this flour might have been sold, without justly incurring the imputation of having acted without reasonable care and diligence, ascertain *that day*, and then determine what price could have been obtained for it at that time, in selling it in the usual mode, and in the exercise of proper care and diligence. The defendants should be charged with that price, and be credited with advances made and charges paid, and the further expenses that would have accrued, and interest on them, to the time when the price of the flour would have been realized by them. The balance, with interest to the time of the verdict, is the sum the plaintiffs are entitled to recover.
9. The jury having found, under a question specially submitted, that the defendants, in selling at the time they did, failed to exercise that care and diligence which prudent consignees, having the information which the defendants then had, and acting on their own account, would have exercised, it was also held, that the vari-

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since between the fact found, and a declaration which, in addition to alleging a disobedience of orders, also averred that the defendants acted "carelessly, and negligently, and inattentively, sold prematurely, and for less than they could have obtained; if they had faithfully performed their duties," was immaterial, inasmuch as the act of April 11, 1849, (Laws of 1849, p. 705, § 2, Sub. 1) applied sections 169 to 176 of the Code, inclusive, to future proceedings in civil actions which were pending when the Code took effect.

Judgment, on a verdict in favor of the plaintiffs for \$7,829 62, affirmed.

(Before DUER, BOSWORTH, and SLOSSON, J.J.)

Argued, March 12; decided, May 16, 1857.

THIS action came before the Court at General Term, on an appeal by the defendants, from a judgment in favor of the plaintiffs, and from an order denying a motion for a new trial. It was put at issue prior to the Code, and the pleadings are drawn under the pre-existing practice. The complaint contains the common money counts, and two special counts.

The first special count states, that the plaintiffs are, and were merchants and copartners in trade in New York, and the defendants are, and were merchants and factors, and partners trading in Liverpool, the consignment to the defendants in June 1846 of 5,000 bbls. of flour, worth \$35,000, for sale, under instructions as to selling it, which the defendants received and agreed to obey, but which they violated by selling before they were authorized to sell, and "in such sale, conducted themselves negligently, carelessly, and without due attention to their duty, as such factors of the plaintiffs, and through such carelessness, negligence, and inattention, sold the said merchandise prematurely, and before the same ought to have been sold by the defendants," and at low and insufficient prices, whereby the plaintiffs were damaged to the amount of \$20,000. The second special count reads thus, viz:

"And also, for that whereas the said defendants, heretofore, to wit, on the eighteenth day of July, in the year last aforesaid, at Liverpool aforesaid, received a certain other large quantity of merchandise, to wit, other five thousand barrels of flour, of the said plaintiffs, of great value, to wit, of the value of thirty thousand dollars, at Liverpool, to be there taken care of, dealt with, disposed of, and sold by the defendants as factors and agents of the plaintiffs in this behalf, for a reasonable reward, to be allowed to them by the said plaintiffs in this behalf, whereby it became

and was the duty of the plaintiffs, among other things, to obey the orders of the said plaintiffs, touching the sale, management, and disposal of the said last mentioned merchandise; and in consideration thereof, the defendants then and there undertook and promised to the plaintiffs to perform and fulfil their duty as factors of the plaintiffs in this behalf, to wit, on the day and year, and at the city and county of New York aforesaid.

"Yet the defendants, their promise in form last aforesaid made, not regarding, but contriving and intending to deceive and defraud the plaintiffs in this behalf, and contrary to their duty as their factors, and contrary to the orders of the said plaintiffs in this behalf, given to, and received by the defendants, and carelessly, and negligently, and inattentively sold the said merchandise prematurely, and for low and insufficient prices, and for less prices than they might and could have had and obtained therefor, if they had well, faithfully, and diligently performed and fulfilled their duty as factors of the plaintiffs in this behalf; and thereby the plaintiffs lost the difference in price which they would have received if the defendants had properly conducted themselves in this behalf, which difference in price amounts to a large sum of money, to wit, twenty thousand dollars."

The defendants plead, (first), *non-assumpsit*, as to all the alleged premises, except as to the sum of \$153.95 parcel of the said several sums of money, and as to that sum, (second) a tender thereof before suit brought, averring a continuing readiness, and present offer to pay it. The plaintiffs replied to the second plea, admitting the tender, and took the money as a satisfaction *pro tanto*.

The action was brought to trial, before Mr. Justice BOSWORTH and a jury on the 27th of May, 1856.

On the trial, it appeared that, at the time of the transactions in question, the plaintiffs were commission merchants in New York with a branch house in New Orleans.

The defendants were commission merchants in Liverpool, with a branch house in New York.

In the month of June, 1846, the plaintiffs shipped to the defendants 5000 barrels of flour by the ship Nicholas Biddle, and 3000 barrels by the ship Georgianna. The flour was all of the same quality, and arrived about the same time, and was all consigned to the defendants as factors.

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The plaintiffs sent two letters of instructions, one dated June 25, 1846, and the other, more particular and explicit, dated June 27 of the same year, which letters were both received by the defendants before the flour arrived. The British Corn Law Bill reducing the duties on foreign breadstuffs was then before Parliament, and the flour was shipped and the instructions were given in view of the immediate passage of that law.

The bill received the royal assent on the 27th of June, 1846, and went into operation three days after.

The defendants sold the 5,000 barrels per Nicholas Biddle on the 4th, 5th and 7th of August, at such prices as to give the plaintiffs but \$2 17 per barrel; net.

Before they sold the Georgianna flour, one of the plaintiffs reached Liverpool, and that shipment was not sold until September, October, and November following.

If the Biddle flour, which was of the same quality, and which arrived at the same time, had been held as the Georgianna, it would have netted the plaintiffs, computing interest up to the day of trial, \$14,530 29 more than they received.

The plaintiffs claimed this sum as their damages for the alleged sacrifice of their flour. Under the rules of law, as stated by the Court, the jury found that the defendants would have been excusable had they sold the flour at an earlier day than, according to the claim of the plaintiffs, it could properly be sold, and the verdict was rendered for the value of the flour on that day, to wit, for \$7,829 62."

The letters, dated June 25th and 27th, 1846, are as follows, viz.:

"NEW YORK, June 25, 1846.

"Messrs. A. DENNISTOUN & Co., Liverpool:

"Gents.—We had this pleasure 30th ulto., advising of shipment to your address, an invoice of flour, pr. ship 'N. Biddle,' from N. Orleans.

"We would now inform of having consigned to you five thousand (5,000) barrels flour, pr. 'N. Biddle,' and three thousand barrels flour p. ship 'Georgianna,' (3,000) both from New Orleans. Owing to some oversight at N. O. we have not rec'd the entire sets of bills of lading, and have therefore been unable to perfect our arrangements with your house here, but hope to

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do so in time for the 'Caledonia' mail; when we shall hand you invoices.

"You will please make no disposition until we give you our wishes, pr. 'Caledonia,' unless 22s. in bond is obtainable, in which case, if in your judgment deem it our interest to accept that sum, please to do so.

"Our R. W. Milbank designs visiting your city soon, and we trust our correspondence may be extended. Owing to the apprehension of exorbitant premium for the 'war risk,' being demanded, we have, under the advice of your house here, covered these shipments by insurance in our city Co's. The same is subject to an average of five per cent. damage.

"Very respectfully,

"I. & R. MILBANK & Co."

"Caledonia.

"NEW YORK, June 27, 1846.

"Messrs. A. DENNISTOUN & Co., Liverpool:

"Gentlemen,—Enclosed you will please find invoices of five thousand barrels 'superfine' flour, pr. ship 'Nicholas Biddle,' and three thousand barrels 'superfine' flour pr. ship 'Georgianna,' to your address. The bill lading we have handed to your Messrs. Dennistoun & Co., with whom we have made arrangements to advance us two dollars and seventy-five cents pr. barrel on the shipment per 'N. Biddle,' and two dollars and twenty-five cents pr. barrel on shipment pr. 'Georgianna,' based on sixty days sterling bills at 8 pr. ct. This flour is from the best Cincinnati mills, and in fine order, having been forwarded directly from flat-boats to ships. We are induced to hope for its sharing a better fate than ordinary shipments from N. Orleans, as we trust it may arrive out in sweet condition. When shipping we had hoped for a better market than the prospect now justifies. We fear the first introductions for consumption may tend to continue low prices, as they will probably be large immediately on the passage of the new bill. Believing that after the stocks now in bond shall have been reduced by consumption, &c., that an improvement may ensue, we would express our desire that these parcels may be withheld from the market until the operation of the new law shall have produced its results. We hope we may

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not err in assuming its passage. Though if 22s. in bond is obtainable on arrival, and you think our interest dictates such sale, please so dispose of it; as we have before advised, the shipments are insured here under direction of your house. Our R. W. Milbank designs visiting your city by steamer 17th July, and will confer with you.

"Very respectfully,

"Your ob't serv'ts,

"I. & R. MILBANK & Co."

Endorsed—"Rec'd 12th July."

On the 30th of June the plaintiffs wrote again, stating that the flour was insured in New York, at \$4 a barrel, and that R. W. Milbank would soon communicate with the defendants in person.

On the 3d of July the defendants wrote and sent their circular, reading thus:

"Cambria steamer.

"LIVERPOOL, 3d July, 1846.

"Messrs. J. & R. MILBANK & Co., New York:

"Dear Sirs,—We have none of your valued favors since we last addressed you on the 18th June.

"Our New York house advise us that you are sending to our address 3,000 barrels flour, p. Georgianna, to which, as well as to consignment pr. Nicholas Biddle, we shall give every attention, and trust they may come to a good market.

"The flour market was very dull to-day, and the printed quotations in the annexed may be considered from 6d. to 1s. p. barrel too high.

"We remain, dear sir,

"Yours truly,

"A. DENNISTOUN & Co."

(Extract from Circular.)

"Grain and Flour.—The new corn bill received the royal assent on the 27th ultimo, and is now law. The whole stock of foreign grain and flour in this port, and throughout the kingdom, upwards of two millions of quarters of wheat and flour together, has been cleared at the Custom House, at the minimum duty,

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viz, 4s. per quarter on wheat, or about 2s. 5d. on the barrel of flour. The whole of this stock is now available for home consumption, and has been freely brought forward the last few days. Prices have altered so little, that the old quotations must remain, the duty being added. Free wheat has declined 4s. to 5s. per quarter within the last few days. Western Canal and Genesee flour is about 1s. to 1s. 6d. per barrel higher than on the 18th June, being now quoted 27s., and New Orleans, Virginia and Philadelphia 24s. to 25s. per barrel; these quotations being understood to apply to duty paid flour. Indian corn is in very dull demand, and prices again lower, white and yellow now bring about the same price, 30s. to 33s. per 480 lbs."

On the 18th of July the defendants replied to the plaintiffs' letters of the 25th and 27th of June, and attached a printed circular, as follows:

"Pr. Boston str.

"LIVERPOOL, 18th July, 1846.

"Messrs. I. & R. MILBANK & Co., New York:

"Gentlemen,—Since writing you on the 3d inst., we have received your valuable favors of the 25th June, by the Gt. Western, and 27th and 30th June, pr. Boston st's, and we duly note their contents.

"The 'N. Biddle' arrived to-day with your 5,000 brls. flour, and we shall pay the present duty on it at once, as next week it is probable it will go up to 6s. on wheat, and 8s. 7½d. on flour. You seem inclined to think that 22s. per brl. should be taken for it in bond, but this is 25s. free at present; and this figure is not obtainable for New Orleans flour. If of good quality, and sweet, 24s. might be obtained. In two days we hope to get a sample, and have it valued; but as we have little expectation of getting an offer at the price you allude to, we shall likely store the flour, and await the arrival of Mr. R. W. Milbank, with whom we can confer as to the future proceedings. We refer to the annexed circular for the state of our markets, and business generally, and are, gentlemen,

"Your obd't servants,

"A. DENNISTOUN & Co.

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(Extracts from Circular annexed to above letter.)

"Grain and Flour.—The weather has been favorable generally throughout the kingdom since the 3d instant. Harvest operations have begun in the southern counties, and will be general in ten days or a fortnight, should the fine weather continue. The importations, too, of foreign grain and flour, having been large, and dealers continuing disinclined to buy, except for immediate use, prices have been further depressed. The best New York wheat will not bring more than 7s. 6d. per bushel of 70 lbs.; Western Canal and Genesee flour, 22s. 6d. per barrel; New Orleans, Virginia and Philadelphia, 23s. to 25s. per barrel. Indian corn is quite neglected, and has been sold as low as 26s. per quarter of 480 lbs.

"The duty on foreign wheat is now 5s. per quarter, and 3s. on the barrel of flour."

On the 3d of August, the defendants sent the following letter and the printed circular attached, to the plaintiffs, viz:

"Liverpool, 3d August, 1846.

"Messrs. I. & R. MILBANK & Co., New York:

"Gentlemen,—Since we had this pleasure on the 18th July, the Georgianna, from New Orleans, has arrived with 3,000 brls. flour on your account. We much fear that this shipment, as well as that per Nicholas Biddle, will disappoint you, as in common with almost all the flour from the Gulf this year, if not sour, will only bring the price of sour.

"Our market has been at a stand for some days, but as the last two or three days have been unsettled, there may possibly be some activity to-morrow.

"The annexed circular gives you our general views as to business.

"And we remain, dear sirs,

"Yours truly,

"A. DENNISTOUN & Co."

(Extract from the Circular annexed to the above.)

"Grain and Flour.—The weather has been remarkably favor-

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able for the grain crops for the last fortnight. Harvest in the southern counties is now pretty general, and a fortnight more of warm and dry weather will make it so throughout the kingdom. This forward state of our crops has had an important effect on prices, and wheat must be quoted 4s. to 5s. per quarter lower than on the 17th ultimo. Fine American wheat will not bring more than 7s. per bushel of 80 lbs.; Western Canal and Genesee flour 25s. to 25s. 6d. per barrel; New Orleans, Virginia and Philadelphia 22s. to 24s. per barrel. Indian corn has been in much better demand, in consequence of the accounts from Ireland of the potato crop being very alarming. Yellow corn is scarce, and much inquired for, and prices range from 28s. to 30s. per quarter of 480 lbs.

"The duty on foreign wheat has advanced to 6s. per quarter, in consequence of the rapid decline in the average price. On flour, it is 8s. 7½d. per barrel, with every chance of a still further advance in the duty, should the weather continue favorable."

After writing that letter, the defendants sold the flour shipped per N. Biddle, as follows:

Note of Sale of Flour.

"1846.

" August 4.	2,486	barrels	flour	per	Nicholas Biddle,	sold at	
						21s.	pr. 196 lbs.
" " "	100	"	"	do		21s. 6d.	"
" " 5.	861	"	"	do		21s.	"
" " 7.	1,546	"	"	do		21s.	"

"4,993 barrels flour."

This at the time of the sale was out of bond, and after the duties and charges were all paid, and was equivalent to a sale at 17s. in bond on arrival.

At this time, no letters or instructions whatever had reached the defendants, except those above given.

The defendants did not advise the plaintiffs of this sale until the 18th of August, when they accompanied the sale note by the following letter:—

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"Liverpool, 18th Augt., 1846.

"Messrs. I. & R. MILBANK & Co., New York:

"Gentlemen,—After writing you on the 3d inst., we were induced, by the continued fine appearance of the season, to sell your flour by the Nicholas Biddle at 21s., as per note above, and this we now regret, as on the 11th or 12th inst. a great change for the worse took place in the weather, and the potato crop was completely blighted. A great change has accordingly taken place in the last five or six days in the corn markets all over the country, and New Orleans flour has risen 2s. per brl., with every prospect of a further advance, as the advices are daily more decided, from every quarter of the country, as to the irreparable injury wh. the potato crop has sustained. We accordingly hold your 8,000 barrels, ex 'Georgianna,' in the hope of better prices—in wh., we trust, we shall not be disappointed.

"There are 7 brls., ex 'N. Biddle,' short delivered, for wh. we claim on the ship. We hope by the next steamer to send you ac. sales."

On the same day, by the same steamer, the defendants sent another letter, with a printed circular, as follows:

"Liverpool, 18th August, 1846.

"Sir,—We beg leave to announce that we have assumed, as a partner of this house, Mr. Thomas Sellar, recently one of the resident partners of our New York firm. Referring to his signature below,

"We are, sir,

"Your obedient servants,

"A. DENNISTOUN & Co."

"Mr. Thomas Sellar will sign

"A. DENNISTOUN & Co."

(Extracts from Circular annexed to the above.)

"Grain and Flour.—We have a considerable change to note in the grain market since our last. Within the last few days, the accounts from Ireland, and also from every section of this island, in regard to the potato crop, are most alarming. It seems now beyond a doubt, that this crop will be almost an

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entire failure; and as the weather has been wet and unfavorable also for securing the wheat crop, we must quote higher prices for every description of breadstuffs: Western Canal and Genesee flour is in good demand at 26s. to 26s. 6d. per barrel, duty paid; New Orleans and Philadelphia, at 23s. to 25s. per barrel. Indian Corn continues in great demand, and 32s. 6d. to 33s. per quarter of 480 lbs. is readily given for large quantities.

"The duty on foreign wheat has further advanced, and is now 8s. per quarter, which on flour is 4s. 9½d. sterling per barrel. As the bulk of the new wheat will be of poor quality, and in indifferent if not in bad condition, owing to the wet weather which has prevailed during the last fortnight, it is very probable that the average price may continue low, and the duty high for some time to come."

On the 15th of August, the plaintiffs not having heard that any of their flour had been sold, wrote to the defendants, as follows:

"Hibernia.

"New York, Aug. 15, 1846.

"Messrs. A. DENNISTOUN & Co., Liverpool:

"Gentlemen,—Your kind favor of 18th July is before us. We regret to find your flour market so indifferently sustained; but are disposed to hope there may yet be apparent some redeeming trait in the market ere long.

"We can add only, that our R. M. Milbank designs having the pleasure of a personal interview after the arrival of the 'G. Western,' on which he has taken passage. In the meantime, unless our interests imperatively demand it, will you have the goodness to await the arrival of the 'G. Western' before effecting sales for us?

"Very respectfully,

"Your obt^s servts,

"I. & R. MILBANK & Co."

The plaintiffs, on receiving information of the sales made on the 4th, 5th, and 7th of August, wrote to the defendants as follows, viz. :—

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"Britannia.

"New York, Sep. 15, 1846.

"Messrs. A. DENNISTOUN & Co., Liverpool.

"Gentlemen,—Your favor 18th ulto. has been recd., noting sales of five thousand barrels flour pr. 'N. Biddle,' at the lowest point of the season, say 21s. We were quite surprised that you would force our flour, having in possession our wishes to hold until the result of the crop in your country should have been known; and, particularly, as you took no occasion, in your letter of 8d August, to decline complying with our suggestions, we had a right to suppose you would hardly effect sales the following day.

"Will you have the goodness to state if the flour pr. 'N. Biddle' was sour or sweet? We had every hope that it would go out sound; and were astonished to find by yours of August 8d, that no discrimination was made in 'Gulf flour.'

"We trust we may get better act. from the Georgianna shipment.

"Yours respectfully,

"I. & R. MILBANK & Co."

The defendants, on the 8d of October, 1846, wrote to the plaintiffs, thus:—

"Liverpool, 8 Oct., 1846.

"Messrs. I. & R. MILBANK & Co., New York:

"Dear Sirs,—Since we had this pleasure, on the 18th Sept, we have received your esteemed favor of the 15th idem, and note its contents. We regret exceedingly the unfortunate sale per 'Nicholas Biddle;' at the time it was made, however, the potato blight had not occurred, and the prospect of a good harvest was before us."

(Extracts from Circular annexed to the above.)

"Flour and Grain.—The distressing accounts of the scarcity in Ireland, and the continued demand for the Continent, have caused a further advance in the price of flour of 4s. per barrel."

On the 81st of October, 1846, the plaintiffs replied to the defendants' letter of the 8d of that month as follows, viz.:

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"Caledonia.

"New York, Oct. 31, 1846.

"Messrs. DENNISTOUN & Co., Liverpool:

"Gentlemen,—Your favor 8d inst. is duly at hand. We have not addressed you for the past few steamers, our R. W. Milbank being in personal communication with you.

"We have been long looking for ac. sales flour pr. 'N. Bidle,' that we might see precisely the condition of the sale, &c., and hope soon to hear from you on that subject. Our R. W. Milbank, as you are aware, made known to you that he took exceptions to the sale, as reported; and your house here were duly informed that we also excepted to the sale, as reported.

"We trust that, after viewing the case, you have determined to furnish such sale and acs. as will conform to our instructions when shipping.

"These we hope soon to receive, and, in the meantime, remain,

"Yours respectfully,

"I. & R. MILBANK & Co."

The plaintiffs wrote the following letter on the 31st of July, 1846, to the defendants, who received it on the 12th of August following:

"Cambria.

"New York, July 31, 1846.

"Messrs. A. DENNISTOUN & Co., Liverpool:

"Gents,—Annexed please find duplicate of ours of 21st instant, per 'Hottingeur.'

"We suppose that ere this the crop of wheat has been ascertained as to its probable yield, and the grain and flour conformed to such result. We therefore ask you to exercise your discretion in effecting sales for us.

"Can you encourage shipments of wheat from N. Orleans, handsomely fanned and cleaned? We would ship you a parcel, if you can so advise.

"Yours very respectfully,

"I. & R. MILBANK & Co."

Endorsed—"Rec'd 12th August."

On the trial, the defendants read the depositions of various

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witnesses residing in England, who had been examined on commission, and on this appeal claim that such depositions, and other evidence in the cause, establish the following facts, viz. :—

“The stock of flour and wheat in bond previous to the passage of the corn law, had accumulated, in anticipation of the reduction of the duty.

“The operation of the new law was to release from bond the entire stock, and to bring it immediately into the market, for consumption.

“The stock thus liberated, was rapidly reduced by consumption.

“The results of the operation of the corn law were produced immediately after its passing, in the judgment of these witnesses.

“The flour by the Nicholas Biddle was placed in the hands of a broker, for sale, on or about the 21st day of July, 1846.

“It was found to be sour and heated, and not fit for baking. In consequence of its quality and condition, it was difficult to find purchasers for it.

“In consequence of its condition, it would have deteriorated by being held.

“In the opinion of persons engaged in the grain trade, it was proper for the defendants to sell at the time they did, and such was the general opinion.

“The highest price for flour, after the corn law went into effect, was on the 14th July, on which day 22s., duty paid, was obtainable. Prices afterwards declined.

“Between the 18th of July and the 10th of August, prices continued to decline. The weather was, and long had been, very fine.

“The general opinion at and after the sales of the plaintiffs' flour, was, that the home crop would be good, and the yield large.

“Unprecedentedly great quantities of foreign grain continued to arrive, so that from the 18th day of July to the 10th of August, the stock had reached to 1,500,000 barrels of flour, and to 2,000,000 quarters of wheat, with every prospect of continued importations.

“All the large holders of flour were free sellers; no one was buying on speculation; all persons holding flour were anxious to sell.

“The highest price obtainable in Liverpool for the general quality of New Orleans flour from the day of the arrival of the .

Nicholas Biddle, until the 20th of August, did not exceed 20s. in bond, and 23s. duty paid. On the 3d of August it was 21s. duty paid; on the 11th August, 21s. to 22s., duty paid; on the 15th and 18th August, 22s. 6d., duty paid; on the 20th August it went to 24s., duty paid, but the duty at the latter date had gone up to 4s. 9½d. sterling, per barrel.

"Prices had thus advanced but little, and, considering the increase of duties, not at all, at the end of August; it was not until September that a decided advance took place.

"According to the course of the trade in Liverpool, a broker was employed to sell the flour; he sold it, on the usual credit, for full market value; the sales were made in good faith—in open market, and not in pursuance of any anterior contract or agreement.

"The witnesses on the part of the plaintiffs further expressly proved that the accounts from Ireland of the potato blight, affected the price of Indian corn alone; that it did not influence the prices of wheat or flour, which continued, notwithstanding the reports from Ireland, to decline.

"The improvement that subsequently occurred, was not in any manner attributable to the operation or results of the corn law.

"It arose from the failure of the potato and other crops in England, and to the unlooked for demand from the Continent.

"The extent of the blight was not known so as to affect prices, until the end of August.

"The failure of the potato crop in Great Britain was an unusual occurrence; it was quite unlooked for, and could not have been reasonably anticipated. The prevalence of the potato rot generally, became known in Liverpool about the 16th or 20th August.

"The defendants read the deposition of John King, of Liverpool, who corroborated in substance the facts as testified to by the plaintiffs' witnesses; and who more particularly proved, that Dennistoun & Co. held flour of their own, at the time in question, of a similar description as that of the plaintiffs, and that they sold their own flour, on the 6th of August, 1846, to the extent of 3,008 barrels, at 20s. per barrel.

"The weather was fine at the time of the sales of the plaintiffs' flour, and so continued for several days."

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When the plaintiffs rested, the counsel for the defendants moved for a nonsuit or dismissal of the complaint, upon the grounds—

1. That under the declaration the plaintiffs cannot recover upon any ground, other than that the defendants sold the flour contrary to the orders therein stated.

2. That the evidence does not establish that the defendants violated instructions.

3. That the plaintiffs' alleged orders or instructions, left the time when the operation of the corn law had produced its results to the judgment and discretion of the defendants; and that they were authorized to sell whenever, in their opinion, the operation of the corn law had produced its results; that there is no evidence to establish that the defendants did not exercise a fair and honest judgment, or that the sales were not made according to their best judgment and discretion, in point of time or otherwise.

4. That the plaintiffs had not given proof as to the operation of the corn law nor shown that it had not produced its results at the time of the sales.

5. That the evidence shows, at most, nothing more than an error of judgment on the part of the defendants, and that they are not responsible therefor, there being no proof that they did not exert a reasonable and honest judgment.

6. Even if the declaration was sufficient for that purpose, the plaintiffs, on the evidence, are not entitled to recover on the ground of want of skill or care, or of negligence on the part of the defendants.

7. Nor on the ground of fraud on their part.

8. That the evidence is not sufficient to maintain the action.

But the Court denied the motion, and the defendants' counsel excepted thereto.

When the evidence was closed, the defendants' counsel renewed the motion to dismiss the complaint upon each of the grounds before stated.

The Court denied the motion, and defendants' counsel excepted thereto.

The counsel for the defence then requested the Court to charge the jury—

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1. That the letters containing the alleged orders and instructions left the time when the operation of the new law had produced its results to the judgment and discretion of the defendants, and they were authorized to sell whenever, in their opinion honestly formed, the operations of the law had produced its results.

2. There is no evidence to warrant the jury in finding that the defendants had not exerted an honest judgment as to the time and circumstances of the sale.

3. That it was the duty of the plaintiffs to prove that the operation of the corn laws had not produced the results contemplated in their letter.

4. That even if the evidence tended to show that the defendants had committed an error of judgment, or made a mistake upon the point, whether at the time of the sales the operation of the new law had produced its results, they are not liable upon the evidence so given.

5. That upon the evidence the plaintiffs have not shown that the defendants were liable either on the ground—

1st. Of fraud.

2d. Of negligence or want of skill.

6. That the alleged orders or instructions are ambiguous; and if the defendants construed them as authorizing them to sell whenever, in their opinion, the operations of the law had produced its results, they are not liable in the absence of fraud or negligence.

7. That upon the evidence the defendants were entitled to a verdict.

That if these propositions were not adopted, and the question of damages arose, then the counsel asked the Court to charge the jury:

1. That the plaintiffs were not entitled to recover upon the evidence more than nominal damages; but if this be refused, then,

2. That the defendants were authorized to sell, upon the receipt of the letter of the 31st July, 1846, and no greater damage can be assessed against them than the difference between the amount of the sales and the market prices of such flour at the time when the defendants had a right to sell.

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But as to each and every of the requests so made by the counsel for the defendants, the Court refused to charge otherwise or further than is hereinafter stated, and the counsel for the defendants then and there excepted thereto.

The Court charged the jury as follows:—

The letters of the 25th and 27th of June, 1846, are the only letters containing instructions from the plaintiffs to the defendants which had been received by the defendants before the 5000 barrels were sold. In determining the question whether in selling this flour at the time they did sell it, they violated their instructions, these two letters, and these two only, are to be considered to ascertain what were the precise instructions under which the defendants were then acting.

The counsel for the defendants excepted to this part of the charge from the words "these two letters" inclusive.

The letter of the 25th June forbids any sale by the defendants before they should be advised per Caledonia of the plaintiffs' wishes, unless 22s. in bond could be obtained. In that event, the defendants were authorized to sell at that price, if, in their judgment, it was to the interest of the plaintiffs to do so.

The letter of the 27th June confers larger powers on the defendants. Being, in the opinion of the Court, free from the objection that it is fairly susceptible of two interpretations, it is the duty of the Court to construe it and declare its true import and meaning.

(The counsel for the defendants excepted to that part of the opinion of the Court which declared that the letter last mentioned was free from the objection that it was fairly susceptible of two meanings.)

It states an apprehension or fear of the plaintiffs, that under the operation of the new law, the first introductions for consumption may tend to continue low prices, as they would probably be large on the passage of the new law.

It also expressed a belief that after the stocks then in bond should have been reduced by consumption, that an improvement might ensue, and then expressed a desire of the plaintiffs that these parcels might be withheld from the market, until the operation of the new law should have produced its results.

The obvious meaning of these instructions is, that these par-

cels were to be withheld from the market, until the operation of the new law should have produced its results in view of the effect produced as well by a reduction of the stock then in bond by consumption, &c., as by the introduction of large quantities into the market by means of the duty being diminished.

But in connection with this construction, the defendants were also authorized to sell if 22s. in bond was obtainable on arrival, and the defendants thought that the interests of the plaintiffs required a sale on such terms. But the defendants did not sell on such terms, and the question is, whether they sold without waiting until the operation of the law had produced its results in the sense which I have stated; or, to express my views more clearly, without waiting until the defendants in the exercise of fair diligence and in good faith, might have supposed and believed upon the information which the evidence shows they had, that such results had been ascertained.

(To which opinion and decision of the said Justice from the words "the question is," &c., the counsel for the defendants did then and there except.)

The defendants were to judge when the new law should have produced its results within the meaning of the word "results," as used in that letter.

They were bound, at all events, to withhold the flour from the market until the stock in bond on the passage of the corn law had been reduced by consumption, &c. Until it had been reduced by consumption, &c., the time would not arrive at which, nor would all the contingencies have happened on which the contemplated results would have been produced, and could be ascertained.

(To which decision and opinion the counsel for the defendants excepted.)

But it was both the right and the duty of the defendants, in the exercise of good faith and of proper care and diligence, to determine, after the stock in bond had been introduced into the market, and had been reduced by consumption, &c., whether and when the law had produced its results within the proper meaning of the word "results," as I have explained it; and also to determine thereupon when their duty and the interests of the plaintiffs required them to sell, acting under such instructions.

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(To which opinion and decision the counsel for the defendants excepted.)

If, in selling at the time they did, they sold before the stock in bond had been introduced into the market, and had been reduced by consumption, &c., they sold before they were authorized to sell, and are liable for the consequences of that act.

(To which opinion and decision, the counsel for the defendants did then and there except.)

If they did not sell until after those two events had occurred, they are not liable, unless they failed to exercise that care and diligence which a prudent consignee, acting on his own account and with the knowledge or information which the evidence shows they possessed, would have exercised.

(To which opinion and decision, from the words "unless they failed" inclusive, the counsel for the defendants did then and there except.)

Did they fail to exercise that kind of care or diligence, or disobey their instructions as I have explained them, in selling before the change had occurred in the market, of which they speak in their letter of the 18th of August?

(To which opinion and decision the counsel for the defendants excepted.)

If they did not do either, they are not liable. If they did do either, they are liable.

(To which opinion and decision the counsel for the defendants excepted.)

After the change in the market had occurred to which that letter refers, it was their duty to act with reference to the interest of the plaintiffs, as they would be affected by that change and the causes which had produced it.

(To which opinion and decision the counsel for the defendants did then and there except.)

On the 12th August, the defendants had received the plaintiffs' letter of the 31st July, which confided the matter of selling entirely to the discretion of the defendants.

The defendants, in order properly to discharge their duty to the plaintiffs under the instructions given to them by the letter of the 31st of July, were bound to exercise good faith and reasonable care and diligence—such care and diligence as a con-

signee of ordinary care and prudence, not coerced by any necessity to sell and acting on his own account, would have exercised under the same circumstances.

(To which last mentioned instructions the counsel for the defendants did then and there except.)

It was their duty to act with reference to the information they had as to the quantity in the market, and upon their best judgment as to the extent of the demand that would soon exist for such property, the means of supply according to their best judgment of such means, whether to be derived from the stock then existing, or from the harvest of that season.

(To which opinion and decision the counsel for the defendants did then and there except.)

Whether the defendants failed to exercise proper care and diligence in selling at the time they did, is a question of fact which the jury must determine on the whole evidence.

(To which opinion and instruction the counsel for the defendants excepted.)

If they failed to exercise it, then they are liable for that cause. If they did not fail to exercise it, then they are not liable, unless they disobeyed their instructions. If they did neither, the case is at an end, and your verdict must be for the defendants.

But if they disobeyed their instructions, as I have explained them, or failed to exercise proper care and diligence in selling at the time they did, they are liable, and the plaintiffs are entitled to recover.

(To which opinion and instruction the counsel for the defendants excepted.)

If you find for the plaintiffs, the next question is, what amount of damages are the plaintiffs entitled to recover?

This depends upon the question at what time might the defendants rightfully and properly have sold under the instructions received on the 12th of August. The defendants received on that day the plaintiffs' letter of the 31st of July, in which the plaintiffs stated, "we suppose that ere this the crop of wheat has been ascertained as to its probable yield, and the grain and flour conformed to such result. We therefore ask you to exercise your discretion in effecting sales for us."

If the defendants could not have sold before that date, in obe-

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dience to the prior instructions under which they were acting, assuming such instructions to have the meaning which the court has stated, then at how early a period after the 12th of August might they, under the facts as you shall find them from the evidence, have sold in the exercise of such care and diligence, and having the same regard to the interests of the plaintiffs as consignees of prudence, acting on their own account, would have and exercise under similar circumstances?

(To which charge, opinion and decision the counsel for the defendants excepted.)

At that time, at whatever date you may be convinced by the evidence it should be fixed, the defendants might sell, and they should be required to account for the wheat at the price which the evidence shows to have been then its fair market price.

(To which opinion and decision the counsel for the defendants excepted.)

Whether the time is the day on which they received the letter of the 31st of July or the day on which any part of the Georgianna flour was sold, or some intermediate day, you must determine on the whole evidence.

To which opinion and decision, the counsel for the defendants excepted.

The defendants, in their letter of the 18th of August, expressed a regret at having sold as soon as they did, and placed this regret on the ground, that on the 11th or 12th a great change for the worse took place in the weather, and the potato crop was completely blighted; that a great change had taken place in the last four, five or six days in the corn market all over the country. New Orleans flour had risen 2s. per barrel, with every prospect of a further advance. They also stated that accordingly they held the 3,000 barrels ex "Georgianna" in the hope of better prices.

On the 11th September they write that there had been a material advance in the prices of grain and flour since the 3d of September, and that they quoted the New Orleans at 26s. a 27s. 6d. duty paid, and stated that that in bond had brought 22s. 6d. a 28s. On the 18th of September they wrote, that they still held the flour per "Georgianna," but expected that the favorable position of the market would enable them soon to place it advanta-

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geously. On the 8d of October they wrote that they sold 1,000 barrels of it on the 26th of September, at 28s. 6d.

On the 19th of October they wrote that they sold on the 16th of that month 200 barrels at 28s., and that on the day the letter was dated, the balance being, 1,794 barrels at 29s. 9d.

You will look at all the evidence bearing upon the question at what time the market prices of flour began to advance, what continued to be the tendency of prices, and what must have been the views of men of prudence, having such information as the defendants had, acting with reasonable care and diligence, as to the time when this flour might have been sold without justly incurring the imputation of having acted without reasonable care and diligence.

(To which opinion and decision the counsel for the defendants did then and there except.)

The evidence consists not only of the defendants' letters and circulars, but also of the depositions of witnesses as to the state of the market, the amount of grain in the market, and the deliberate opinion of persons engaged in the same business, and all other evidence bearing on the question.

When you shall have fixed that time upon a careful consideration of all the evidence before you, you will determine what price the defendants could have obtained for it then, in selling it in the usual mode, and in the exercise of proper care and diligence.

(To which opinion and decision the counsel for the defendants did then and there except.)

With that price you will charge them. You will credit them with advances made and charges paid, and the further expenses that would have accrued and interest on them, to the time when the price of the flour should have been realized by them. From the difference you will deduct \$158,94, and for the balance then left, with interest, to this date, the plaintiffs are entitled to your verdict if you find they are entitled to recover anything.

(To which opinion and instructions the counsel for the defendants did then and there except.)

The counsel for the defendants did also then and there except to the charge, because it did not instruct the jury, in compliance with the defendants' request.

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The Court directed the jury to find upon the following questions:

FIRST.—Did the defendants sell the 5,000 barrels of flour before the stock of grain in bond, at the time the law referred to in the letter of the 27th of June, had been introduced into the market, and had been reduced by consumption?

Answer.—Yes.

SECOND.—Did the defendants, in selling the flour at the time they did, fail to exercise that care and diligence which prudent consignees, having the information which the defendants then had, and acting on their own account, would exercise?

Answer.—Yes.

And the Court, under the charge and direction aforesaid, left the aforesaid issue, and the evidence so given on the trial thereof, to the said jury. And the jury aforesaid then and there answered both the questions so submitted to them by the said Justice in the affirmative, and gave their verdict for the plaintiffs for the sum of \$7,829,62.

The defendants moved for a new trial, on the ground, among others, that the verdict was against evidence: The motion was denied, and judgment was entered upon the verdict. From the order denying a new trial and from the judgment the defendants appealed to the General Term.

F. B. Cutting and *M. S. Bidwell*, for defendants, the appellants,

Edwards Pierrepont and *James T. Brady*, for plaintiffs, and respondents.

BY THE COURT. BOSWORTH, J.—The letter of the 25th of June, 1846, instructed the defendants to make no disposition of the 5000 bbls. per "N. Biddle," or of the 3000 bbls. per "Georgianna," until after receiving advice per "Caledonia," "unless 22s. in bond is obtainable," in which case, the defendants were authorized to sell, if they deemed it for the interest of the plaintiffs to accept that sum.

The letter of the 27th of June, was sent by the Caledonia, and received by the defendants on the 13th of July.

In the letter of the 27th of June, the plaintiffs say: "We fear

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the first introductions for consumption may tend to continue low prices, as they will probably be large immediately on the passage of the new bill. Believing that after the stocks now in bond shall have been reduced by consumption, &c., that an improvement may ensue, we express our desire that these parcels may be withheld from the market until the operation of the new law shall have produced its results"—* *. "Though if 22a. in bond is obtainable on arrival, and you think our interest dictates such sale, please so to dispose of it."

"The new law" received the Royal assent on the 27th of June.

The N. Biddle arrived on the 18th of July, and 22a. in bond, was not then attainable.

Twenty-two shillings, in bond, was then equivalent to 25a. duty free, and that price was not then attainable.

The desire expressed in the letter of the 27th of June, was, that in such an event, these parcels should be "withheld from the market" until the operation of the new law should have produced its results.

The flour was placed in the hands of Mr. Parker, as a broker, on or about the 21st of July. The N. Biddle arrived on the 18th of July. He offered it for sale, in the open market, and so sold it. Consequently it cannot be said to have been withheld from the market a single day, and the presumption is exceedingly strong, that it was put in market as soon as samples of it could be obtained, to be exhibited.

On the 18th of July, the day the flour arrived, the defendants wrote, that in two days they hoped to get a sample of the flour, and have it valued.

Assuming that samples were obtained within the anticipated time, the flour was put in charge of a broker for sale, as soon as he could be furnished with samples.

The discharging of it was commenced about the 27th of July. Discharging it at the rate of 1000 barrels a day, would require five days.

The jury found specially, that the defendants sold "the 5,000 barrels of flour before the stock of grain, in bond, at the time the law referred to in the letter of the 27th of June, had been introduced into the market, and had been reduced by consumption."

The jury were charged that the defendants were bound, by

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their instructions, at all events, to withhold the flour from the market until the stock, in bond, on the passage of the corn law, had been reduced by consumption, &c. Until it had been reduced by consumption, &c., the time would not arrive at which, nor the contingencies have happened on which the contemplated results would have been produced, and could be ascertained.

"But it was both the right and the duty of the defendants, in the exercise of good faith, and proper care and diligence, to determine, after the stock in bond had been introduced into the market, and had been reduced by consumption, &c., whether, and when the law had produced its results within the proper meaning of the word, 'results,' as I have explained it—and also to determine, thereupon, when their duty and the interests of the plaintiffs required them to sell, acting under such instructions."

"If, in selling at the time they did, they sold before the stock, in bond, had been introduced into the market, and had been reduced by consumption, &c., they sold before they were authorized to sell, and are liable for the consequences of that act."

"If they did not sell until after these two events had occurred, they are not liable, unless they failed to exercise that care and diligence which a prudent consignee, acting on his own account, and with the knowledge or information which the evidence shows they possessed, would have exercised."

Whether the Judge, in submitting the question, in answer to which the jury found the particular facts, above quoted, expressed any views, as to what must be understood by the words, "reduced by consumption," &c., the case does not disclose.

Those views, if any were stated, must be deemed to have been satisfactory to both parties. If it is to be assumed, that none were stated, then it is to be observed, that it does not appear that either party desired any particular instruction on that point, and that that matter was treated as one in respect to which the experience and intelligence of the jury required no aid from the Court.

We think this part of the case was submitted to the jury in a form as favorable to the defendants as they had a right to ask, if there was evidence which warranted any submission of the questions of fact, on which they passed and rendered their verdict,

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The flour was sold on the 4th, 5th, and 7th of August, at 21s., duty free, except 100 bbls., which were sold at 21s. 6d.

There is evidence enough to justify a jury in finding, that, from the 18th of July, when the flour arrived, until about the middle of August, the prices were rather declining, and that there was no sensible diminution of the stock in the market.

								a. d. to s. d.
Defendts' letter of July 8d, 1854, quotes N. Orleans at	24	-	25					
" " " " 18, " " "	"	23	-	25				
" " " Aug. 3, " " "	"	22	-	24				
" " " " 18, " " "	"	23	-	25				
" " " Sept. 3, " " "	"	23.6	-	25				
" " " " 11, " " "	"	26	-	27.6				
" " " Oct. 3, " " "	"	23.6	-	29				
" " " " 19, " " "	"	33	-	34				

John Parke says, the highest price obtainable for New Orleans flour, in bond, between the 15th of June and the end of July, 1846, was 20s. and duty paid, was 23s. The prices were declining a little between the 18th of July and the 10th of August.

John Harnett says, the highest price, between the 15th of June and the 31st of July, 1846, was on the 14th of July; and then, duty paid, it was 22s. The price of such flour, immediately on the passage of the act, duty paid, was between 21s. and 22s.

John Francis Godwin says, the highest price obtainable for such flour, between the 15th of June and the end of July, 1846, in bond, was 22s., and he thinks this was at the end of June. The prices, from the 18th of July to the 10th of August, were constantly declining.

The jury might very well find that an improvement of prices had not commenced, between the passage of the Corn Law and the sale of the flour; that as soon as samples could be procured, and about the 21st of July, the 5000 bbls. were put into the market, to be sold, by a broker; that the discharging of the flour was not begun till about the 27th of July; and that it was sold about as soon as it was placed in store, the sales being on the 4th, 5th, and 7th of August.

The jury might also have found, on the evidence, and properly too, that there had been no such reduction, by consumption, &c., as to effect an improvement of prices, or as would furnish any

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basis for judging that such anticipated improvement was not morally certain to result.

On the 8d of July over two millions of quarters, of wheat and flour together, had been cleared at the Custom House, at the minimum duty.

Up to the 18th of July, "the importations of foreign grain and flour had been large, and dealers were disinclined to buy, except for immediate use, and prices were further depressed."

Mr. Harnett says, the quantity of stock of foreign grain in the United Kingdom, from the 18th of July, 1846, to the 10th of August following, was unprecedentedly large—never so large before, in his recollection. There was about a million and a half barrels of flour, and about two millions to two millions and a half of wheat in the United Kingdom.

We cannot doubt that there was sufficient evidence of a violation of instructions to call for the submission of that question, as a question of fact, to the jury, and that the jury have determined it against the defendants, on evidence which warrants their verdict.

The jury were also instructed, that, if before the change had occurred in the market, of which the defendants spoke in their letter of the 18th of August, the stock in bond had been introduced into the market and had been reduced by consumption, and thereupon the defendants, in the exercise of good faith and proper care and diligence, had determined, or might fairly determine, that the law had produced its results, as the word "results" had been explained to them, they were not liable for selling at the time they did.

The jury were then advised, if the defendants could not rightfully have sold before the change in the market alluded to in that letter had commenced, by what legal rules they should be governed, in determining when the defendants might justifiably have sold.

On the 12th of August, they had received the plaintiffs' letter of the 31st of July. The jury were instructed, that the defendants, in order to discharge their duty to the plaintiffs, properly, under the instructions given to them by that letter, "were bound to exercise good faith and reasonable care and diligence; such care and diligence as a consignee of ordinary care and prudence,

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not coerced by any necessity to sell, and acting on his own account, would have exercised under such circumstances."

And if they found against the defendants, on the question of a proper performance of duty, "they would look at all the evidence bearing upon the question, at what time the market prices of flour began to advance, what continued to be the tendency of prices, and what must have been the views of men of prudence having such information as the defendants had, acting with reasonable care and diligence, as to the time when the flour might have been sold without justly incurring the imputation of having acted without reasonable care and diligence.

"When you shall have fixed that time, upon a careful consideration of all the evidence before you, you will determine what price the defendants could have obtained for it then, in selling it in the usual mode, and in the exercise of proper care and diligence.

"With that price you will charge them," &c.

It was urged, with much ability, that if the jury should answer the first special question in the affirmative, an affirmative answer to the second would follow as a matter of course—as a mere sequence to the first answer.

We do not think that this conclusion is necessarily correct, nor necessarily a reasonable one.

The jury may not have found, or intended to find, any intentional bad faith on the part of the defendants.

And they may have considered, that although the defendants had concluded that the events had occurred which left them at liberty to judge whether the new law had produced its results, and before selling, had judged that the law had produced its results, and that therefore they could properly sell; yet, even under that favorable view for the defendants, in selling at the time they did, they failed to exercise that care and diligence which prudent consignees, having the information which the defendants then had, and acting on their own account, would have exercised.

Hence they may have been of the opinion that whether that view was taken of the case, or whether the conduct of the defendants, as factors, not absolutely prohibited from selling, but authorized to sell, if they had concluded, on a fair exercise

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of care and diligence and of their judgment formed on the information which the evidence showed they possessed, that the interests of the plaintiffs required such a sale as was made—that there was a negligent and careless performance by them of these duties, for the consequences of which they should respond to the plaintiffs.

We think that the case was submitted to the jury as favorably, at least, as the facts of the case justified.

By the letter of the 27th of June, the defendants were not at liberty to sell, on arrival, unless 22s. in bond could be then obtained—that was equal to 25s. duty free.

The “N. Biddle” cargo reached Liverpool on the 18th of July. That was the day of its arrival there. A sale of it was forbidden unless, on “arrival,” 25s. duty free could be obtained.

If that price could not then be obtained, the defendants were required to withhold the flour “from the market,” for a period thence to ensue, and until certain contemplated results, particularly stated in the letter of the 27th of June, as anticipated by the plaintiffs, should have been produced, or ascertained.

The defendants, when prohibited from selling on arrival at less than 22s. in bond, could not immediately take the flour out of bond, and sell it for a price which would not be equivalent to 22s. in bond.

But instead of withholding it from the market, it was placed in the hands of a broker to be offered in the market as soon as samples of it could be procured, and before the discharging of the cargo from the vessel had been commenced. Actual sales commenced about, if not quite as soon as the whole cargo was discharged. It was sold, after the defendants, by their circular accompanying their letter of the 3d of August, or by the letter itself, had informed the plaintiffs that the weather for the then “last two or three days have been unsettled,” and that “Indian corn has been in much better demand, in consequence of the accounts from Ireland of the potato crop being very alarming.”

This sale, the defendants, in their letter of the 18th of August, said they regretted, “as on the 11th or 12th inst. (August) a great change for the worse took place in the weather, and the potato crop was completely blighted.” The circular forming part of that letter states that “the bulk of the new wheat will be

of poor quality, and in indifferent if not in bad condition, owing to the wet weather which has prevailed during the last fortnight." New Orleans flour had then advanced "2s. per barrel, with every prospect of a further advance," and they also wrote, "we accordingly hold your 3,000 barrels, *ex* 'Georgianna,' in the hope of better prices, in which we trust we shall not be disappointed."

This was written after the plaintiff's letter of the 31st of July had been received, which confided the matter of selling entirely to the discretion of the defendants. (That was received on the 12th of August.) I say that letter confided the matter of selling entirely to the discretion of the defendants. It was so construed in the charge to the jury.

But that discretion was given on the supposition, as expressed in that letter, that, ere then, "the crop of wheat has been ascertained, as to its probable yield, and the grain and flour conformed to such result."

That supposition was erroneous. The letter of the 3rd of August, written before any flour was sold, stated that causes were then operating, and of so marked a character that they excited public attention, and which by the 12th of August had produced a marked advance in the market, and a general conviction of a still further advance, in consequence of their effects on the quality as well as probable yield of the crop of wheat of that season.

These facts, are quite conclusive to show, that the instructions to withhold the 5,000 bbls. from the market, were disobeyed, or entirely disregarded, and that no attention was paid to the limitation as to price, which the defendants were required to obtain, as a condition to the right to sell, and that the sale was made while prices had a downward tendency, and when they had reached the lowest point, while the flour sent by the "Georgianna," and covered by the same instructions, was withheld from the market.

Why one cargo should have been immediately put in the market, and sold, and the other withheld, and why the larger instead of the smaller cargo should have been sold, it is difficult to conjecture, unless it was the intention of the defendants, in placing samples in the hands of a broker, merely to have the

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quality and value ascertained, while the broker, on the contrary, acted on the assumption and belief that he was authorized and expected to sell, and having sold, the defendants deemed it best or found it necessary, to complete the sale.

The evidence that, the defendants disobeyed the instructions which they received from the plaintiffs, seems to us to be very strong, and the conclusion most favorable to the defendants is, that such disobedience resulted from a want of, or a failure, on their part, to exercise, that reasonable care and diligence which was essential to a proper performance of their duty, as factors.

The defendants also complain of the construction given at the trial, to the letter of the 27th of June.

The language of that letter is: "We fear the first introductions for consumption may tend to continue low prices, as they will, probably, be large, immediately on the passage of the new bill. Believing that after the stocks, now in bond, shall have been reduced by consumption, &c., that an improvement may ensue, we would express our desire that these parcels should be withheld from the market until the operation of the new law shall have produced its results."

The plaintiffs, doubtless, expected that the importations would be large, in anticipation of the passage of the new law, and that they would be released from bond, by the owners or consignees, availing themselves of the opportunity of releasing it, by paying the minimum duty, immediately on the passage of the law.

Parke testifies that, "the stock in bond, previous to the passing of the Corn Law, was large, in consequence of its accumulating, in anticipation of the reduction of duty."

Harnett testifies to the same thing.

The circular to defendants' letter of the 3d of July, states that "the whole stock of foreign grain and flour in this port, and throughout the kingdom, upwards of two millions of quarters of wheat and flour together, has been cleared, at the Custom House, at the minimum duty, viz. 2s. 5d."

The charge was, that "the obvious meaning of these instructions is, that these parcels were to be withheld from the market, until the operation of the new law should have produced its results in view of the effect produced, as well by a reduction of the stock then in bond by consumption, &c., as by the intro-

duction of large quantities into the market by means of the duty being diminished."

"The question is whether they sold without waiting until the operation of the new law had produced its results, in the sense which I have stated; or to express my views more clearly, without waiting, until the defendants in the exercise of fair diligence and good faith might have supposed and believed upon the information which the evidence shows they had, that such results had been ascertained."

"The defendants were to judge, when the new law should have produced its results, within the meaning of the word 'results,' as used in that letter.

"They were bound, at all events, to withhold the flour from the market, until the stock in bond had been reduced by consumption," &c.

"If, in selling at the time they did, they sold before the stock in bond had been introduced into the market, and had been reduced by consumption, &c., they sold before they were authorized to sell, and are liable for the consequences.

"If they did not sell until after these two events had occurred, they are not liable, unless they failed to exercise that care," &c.

There can be no pretence, as we think, that the jury could have understood from this charge, that the defendants were bound to wait, before exercising their judgment, whether the law had produced its results, until importations should have been introduced into the market, other than those in bond, at the time of its passage.

They were expressly charged, that if the defendants did not sell before the stock in bond had been introduced into the market, and had been reduced by consumption, &c., "they were not liable," unless guilty of a neglect of duty, by reason of their failing to exercise proper care and diligence.

It is also objected, in the points, that "this part of the charge is vague and indefinite, and, in effect, left it to the jury, to fill in under the ' &c., ' whatever their fancy might have suggested."

We think that the use, in the charge, of these words from the letter, presented the case more favorably for the defendants than it would have been by the omission of the " &c."

The result which it was anticipated would improve prices,

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was a "reduction" of the quantity in bond, after it had been introduced into the market, by its consumption, or other causes, in addition, which should prevent its being capable of being sold in the market for human food.

Whatever causes, other than actual consumption, under the evidence, the jury might think had produced such results, and which they might fill in under the "&c.," was beneficial to the defendants, in the process of finding an early day, at which they would be justified in selling.

But the charge was not excepted to, at the trial, on account of the use of the "&c.," or on account of its vagueness.

The defendants object that the pleadings do not warrant a recovery, either on the ground of fraud, or of negligence, or of a want of skill.

The pleadings were drawn before the Code was enacted.

The act of April 11th, 1849, applied sections 169 to 176, inclusive, of the Code, to future proceedings in civil actions, which were pending on the 1st of July, 1848. (Laws of 1849, p. 705, § 2, Sub. 1.)

By § 169, no variance between the allegation in a declaration, and the proof, can be deemed material, unless it shall have actually misled the defendant, to his prejudice, in maintaining his defence.

If a defendant alleges he has been misled, he must prove that fact to the satisfaction of the Court, and in what respect he has been misled. (*id.*)—*Callin v. Gunter*, 1 Kern. 368, 378; *Harmony v. Bingham*, 1 Duer, 209-210.

The 2d count states, the receipt of the flour, to be sold by the defendants, as factors and agents; their duty to obey orders, and their promise to perform their duty as factors; a disregard of their promise; and that, "contriving and intending to deceive and defraud the plaintiffs in this behalf, and contrary to their duty as factors, and contrary to the orders of the said plaintiffs, in this behalf, given to and received by the defendants, and carelessly, and negligently, and inattentively, sold the said merchandise prematurely, and for low and insufficient prices, and for less than they might and could have obtained therefor, if they had well, faithfully, and diligently performed and fulfilled their duty, as factors of the plaintiffs in this behalf; and thereby the plaintiffs lost the differ-

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ence in price which they would have received, if the defendants had properly conducted themselves in this behalf, which difference in price amounts to a large sum of money, to wit, twenty thousand dollars."

The breach, of the duty and promise stated, is alleged, in this count, to consist of the careless, negligent, and inattentive manner in which the defendants acted, in selling the flour. It is also alleged, that damage ensued, to which the plaintiffs would not have been subjected, if the defendants had faithfully and diligently performed their duty, as factors of the plaintiffs in this behalf.

We think that this is, in substance, the matter submitted to the jury, by the second question, which they answered in writing.

Even if the first special instruction, which the defendants requested should be given to the jury, was proper in the absolute and unqualified form in which it was stated, it is not easy to perceive why the second special question might not properly have been submitted to the jury, if there was evidence to justify the submission of the inquiry it embraced, as a question of fact.

We do not think that any error was committed, to the prejudice of the defendants, either in the charge to the jury, or in the admission of evidence, and that the judgment should be affirmed.

GRIFFIN, Respondent, v. CRANSTON, impleaded with JUDSON, et al., Appellants.

In an action by a judgment and execution creditor of one of two partners, to set aside a transfer of his interest in the property of the firm to his co-partner, as being a fraud upon the individual creditors of the transferring partner, the question, whether such transfer is made with intent to defraud is one of fact, and not of law.

When such an action has been tried by the Court without a jury, and the transfer has been set aside as a fraud upon such individual creditors, and the defendant appeals, and the case, as settled, purports in terms, to contain a statement "of the facts and conclusions of law" found by the Court, and no conclusions of law are stated, except such as are affirmed in the judgment or order entered on the decision of the Court; then the conclusions of law so affirmed, should be regarded as

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the Court's conclusions of law upon the particular facts so stated to have been found. The only conclusions stated in such a judgment or order, which can be, properly, treated as conclusions of fact, and as intended to have been so stated, are such, as when found at all, must, from their nature, have been necessarily found as facts.

The Court, on the trial of such an action, should, by its decision, dispose of all questions of right and liability. An order entered on the decision of the action, which disposes of only some of the questions raised by the issues, and orders a reference, expressly reserving the determination of other questions until the coming in of the report of the referee, is not an order, on an appeal from which, any decision actually made on the trial, can be reviewed, except the competency of the Court to direct such an inquiry by the referee, as the order provides for.

When such a transfer by one partner to the other, is made on an undertaking of the latter to pay all the partnership debts, and also, to pay liabilities created by the partner, (who so transfers), in the firm's name, for his own benefit, and the interest so transferred is worth less than the amount of his part of the debts so assumed to be paid, and parts of the transferred property have been so applied, and the residue is being, properly, so applied, the individual creditors of the debtor-partner cannot, in the nature of things, be defrauded, by such a transfer. Nothing is transferred to which they have any right. On such a state of facts, an actual intent to defraud, should not be found, except upon the most clear and satisfactory evidence of such an intent.

When, at the time of such a transfer, three other papers are executed, one being a dissolution of the firm, and one being a paper stipulating to hire the assigning partner and his wife, board them, and pay them \$5000 per annum, if the profits of the future business amount to so much, and the other is a mortgage by the assigning partner of individual property to secure the payment of \$25,000, stated in such mortgage to be due; such papers alone, do not demonstrate that the transfer was made with a fraudulent intent.

The fact, that the instrument of transfer does not disclose its true consideration, will not preclude the transferee from showing what the consideration was, and if it be made to appear that it was sufficient, and that the transaction was honest, it will be upheld. It will not be held fraudulent merely because the written papers do not state the consideration.

The agreement for hiring the assigning partner and his wife, when, upon the other evidence, the transaction appears to be honest, and upon full consideration, will not necessarily establish a fraudulent intent, when by the terms of such agreement the transferee is not to pay any thing for their future services besides boarding them, unless future profits are earned, and their services are clearly worth more than their board. There is an obvious distinction between such a transaction, and the case of a debtor assigning his property upon terms unjust and inequitable as to his creditors, upon the condition of obtaining wholly, or in part, a future support out of the assigned property, as a part of the consideration of its transfer.

Such a mortgage is not void upon its face, nor do its terms demonstrate a fraudulent intent. Upon the question of the intent with which it was made, the defendant may prove any facts that a Court of Equity would allow to be alleged and proved in an action to secure results not provided for by its terms, but on settled principles held to be consistent with it. And if, on the whole evidence, it appears to have been made with an honest intent, a transfer of other property by another

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instrument of the same date, will not be held fraudulent merely because such mortgage, does not on its face disclose the precise debts or liabilities it was made to secure.

Papers of the same date, and between the same parties, when they do not refer to each other, nor in fact relate to the same subject matter, are not, necessarily, to be deemed part and parcel of the same transaction, in such sense that if one cannot be sustained as against the creditors of one of such parties, the others must, as a matter of course, be held fraudulent, or void.

(Before DUNK, BOSWORTH and SLOSSON, J.J.)

Heard, March 17; decided, May 20, 1857.

THIS action comes before the General Term on an appeal by the defendant, Cranston, from a judgment or order made therein, dated October 11, 1856, upon a trial of the action which was had in January, 1856, before Mr. JUSTICE SLOSSON, without a Jury.

It was commenced on or about the 24th of May, 1855, by Edmund Griffin, as plaintiff, against Curtis Judson, Hiram Cranston, and George Slater, as defendants.

The complaint alleges the recovery of a judgment by the plaintiff, against Judson, on the 19th of May, 1855, for \$11,041.97 in this court, the issuing of an execution thereon, on that day, to the sheriff of the city and county of New York, the return of the same wholly unsatisfied, that the judgment is wholly unpaid, that Judson and Cranston, prior to December, 1854, were joint owners of leases of premises known as the New York Hotel, originally executed by M. Morgan and H. W. Field to John B. Monnot, reserving a yearly rent of \$26,000, the said leases being for the term of ten years, from October, 1844, which leases Monnot assigned to Judson and Cranston, in Feb., 1854, and they had received from Monnot's said lessors, a written refusal of a new lease for the further term of five years, at a rent of not more than \$35,000.

Judson and Cranston were also joint owners of the furniture and fixtures of said hotel, and of a large stock of wines and liquors, and were keeping the said hotel. It was a first-class stand for business, their business was large and its profits very great, and the lease and right of renewal, and the good will of the business, were worth at least \$110,000.

Judson, prior to December, 1854, became embarrassed, and to protect the property from, and to hinder, delay, and defraud his

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creditors, and colluding with Cranston to that end, by a deed of assignment, dated the 5th of December, 1854, transferred to Cranston all of Judson's right, title, and interest, in and to the lease of said premises, and the said privilege of renewal thereof, and the furniture, fixtures and stock, and the good will of the said business of hotel-keeping at the same place, without any consideration, or for one merely nominal.

There was an agreement between them that, if Judson arranged with his creditors, he should be put *in statu quo*, and the assignment be cancelled, and if a new lease should be got in the meantime, one half thereof should be for his benefit. In December, 1854, Cranston got a new lease for five years, at a yearly rent of \$35,000. He is now carrying on the business and it is profitable. George Slater was and is a secret partner, but the extent of his interest is unknown to the plaintiff. It prayed a judgment enjoining each of the defendants from disposing of any of said property, that a receiver of Judson's interest be appointed, with power to convert it into money, and to collect what was due to him, and ordering Cranston and Slater to account for the profits since said deed of assignment, and that said deed be adjudged fraudulent and void, and that Judson's interest in the whole be disposed of and applied on plaintiff's said judgment. It was verified the 24th of May, 1855.

The answer of Cranston (which was verified the 15th of Sept'r, 1855), admitted the recovery of the judgment, but stated that, it was confessed on the 19th of May, 1855, to enable the plaintiff to bring this action, and by collusion with Judson, and to extort money from Cranston in order to quiet his possession. It controverts the issuing and return of the execution.

It admits, that prior to December, 1855, he and Judson owned the unexpired term of a lease of ten years, from the 1st of October, 1845, and the furniture and fixtures of said hotel, and were engaged in the business of keeping it, but denies that Cranston had obtained any written or other refusal of a new lease.

It avers, that in or about November, 1854, while he and Judson were keeping said hotel as partners, under the firm name of Judson and Cranston, he discovered that Judson had, fraudulently, and without his knowledge, or authority, or consent, used the funds of the firm, and created debts in its name, for Judson's

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benefit alone, to an amount exceeding his interest in all the said property, and that a large amount of the debts and liabilities thus fraudulently created, were secured by a mortgage of said firm's property, and that Judson was insolvent.

That the firm could not pay the liabilities thus created, and about maturing, without pecuniary assistance. After making this discovery, and on the 27th of November, 1854, he commenced a suit in this court against Judson, based upon the frauds and facts so discovered, to obtain a dissolution of the firm, an accounting, and an injunction, and obtained a temporary injunction, prohibiting Judson from using the name or property of the firm, and an order to show cause why it should not be made absolute.

After the injunction was served, negotiations were entered upon between him and Judson, and their counsel, for a settlement. These resulted in an arrangement whereby the firm was dissolved, and Judson assigned to Cranston all his interest in the business and effects of the firm, and Cranston assumed to pay the debts of the firm, and "certain specified debts to a very large amount," which Judson had contracted in the firm's name, but solely for his own benefit, and which as between him and Cranston, it was his duty to pay——. In pursuance of this arrangement, Cranston continued the business, and procured loans from his friends to pay the debts of the firm, and those fraudulently contracted by Judson, and has paid many thousands of dollars of the same.

Although the business prior to the dissolution had been profitable, yet Judson, prior thereto, had applied the funds of the firm to his own use, and the amount so drawn and used by him, together with the liabilities he had contracted for his own benefit in the firm's name, and which Cranston on the dissolution agreed to pay, as before stated, exceeded Judson's capital and his part of the profits, and on an accounting, he would be largely in debt to Cranston, "and to secure such indebtedness as should, on such accounting, be found to exist, the said Curtis Judson, at the time of said dissolution, executed to this defendant a mortgage for \$25,000, on certain personal property of said Judson, viz: the furniture of the hotel known as the Brevoort House, in the city of New York."

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It denies that the lease and privilege of renewing it, and the good-will of the business, were worth anything to Judson, in the embarrassed condition of the business and of Judson, when the firm dissolved.

It denies that the deed of assignment of the 5th of December, 1854, was made for any such purpose, or with any such motive, as is alleged, and avers that it is incorrectly described, and alleges it was made for full value.

It alleges that, when that assignment was made, Cranston undertook to prosecute the business and obtain the assistance of his friends, with a view to pay the firm's debts and those fraudulently contracted by Judson, which Cranston assumed to pay, and it was an essential part of the whole arrangement that Judson should so assign to Cranston, and for the benefit of the latter, and such undertaking and assumption were a good consideration, and saved the property from sacrifice and loss.

That such assignment was made and taken in good faith, and was absolute, and there was no such agreement or understanding as the complainant states, as to cancelling it and restoring Judson to his former position as a partner.

After the assignment had been made and consummated, and not before, Cranston negotiated for and obtained a new lease for three years from the first of October, 1855, at \$30,000 for the first year, and \$33,000 for each subsequent one. Judson never had any interest in the new lease or in the business, after he assigned as aforesaid. Slater was never a partner with Cranston, either secret or otherwise. The pleadings and evidence, verbal and written, make a case of 226 pages. The printed case, in its narrative of the proceedings had on the trial of the action, states that Judson was sworn as a witness for the plaintiff, against the objection and exception of the defendant, that he was incompetent.

Cranston was offered as a witness in his own behalf, and excluded on the ground that he was not competent, to which decision Cranston's counsel excepted. The printed case states, that "the Court found the following facts and conclusions of law:"

"Special Term, April, 1856, SLOSSON, Justice.

"The following facts are established by the evidence:

On the 25th of February, 1854, Judson and Cranston entered into co-partnership under written articles of that date, "for the purpose of purchasing the lease, furniture, good-will, and fixtures of the New York Hotel," and for the purpose of carrying on the business of keeping said hotel, under the firm name of Judson & Cranston, the partnership to commence at the above date and to continue until the expiration of the term of the lease, then held by Monnot, "and until the expiration of any term or time for which the said parties or either of them might thereafter obtain a lease of said hotel."

(Here, a portion of the finding that the two were to contribute equally, &c., is omitted, as not being material to any points decided; and other omissions, of a similar nature, are made in the remaining portion of the findings.)

"The lease held by Monnot expired on the 1st of October, 1855.

"The purchase was made of Monnot in March, 1854, for \$105,000. Of this sum \$40,000 was paid in cash during the months of March, April and May, and the balance secured by their notes at different dates, except \$5,000, which was to stand as a temporary loan." * * * *

"At the time of their purchase from Monnot, Judson and Cranston executed a mortgage on the entire hotel property to Field and Morgan, the landlords, to secure the rent of the hotel—some \$26,000.

"On the 23d of the same month (March, 1854), they executed a mortgage on the same property to Bininger and Clark, to secure them as endorsers on four notes, amounting to some \$11,000.

In May following a mortgage on the same property was also executed by them to Samuel F. Tiffany, to secure their notes and acceptances, held by Tiffany.

About a year before the partnership with Cranston, Judson had contracted to hire the Brevoort House, another hotel.

It is, perhaps, doubtful whether Cranston knew of this when

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he formed his connection with Judson. He had no interest whatever in the Brevoort House.

From the very commencement of the partnership, Judson appears to have been a borrower of money, and as early as July, 1854, was considerably embarrassed in his pecuniary matters.

He used a considerable portion of the funds and securities of the hotel in matters of his own, having no connection with the New York Hotel.

The entries of these transactions were not, at least all of them were not, entered on the books. He also raised money on paper, created by him, in the name of the firm, to the amount of \$25,000, which he appropriated to his own purposes, and of which entries were not made on the books.

The funds and credit of the firm of Judson and Cranston, which were used by Judson for his separate business, were so used by him without the knowledge or consent of Cranston at the time.

He also borrowed moneys of various parties, ostensibly in some instances at least for the use of the firm, which he seems to have in like manner misappropriated.

In the latter part of the summer of 1854, Judson furnished and stocked the Brevoort House, for which he incurred liabilities to a very great extent, and as the evidence justifies me in believing, appropriated to this purpose a large amount of the moneys raised on the paper improperly created by him in the name of the firm.

The Brevoort House was opened in September, 1854.

In the early part of September, 1854, Judson applied to the present Judge Whiting, to become an endorser on the paper of Judson and Cranston, and to secure him, a mortgage was executed to him by them upon the furniture of the New York Hotel, and which was in substance expressed to be a security for any endorsements which Whiting had made, or should thereafter make, for Judson and Cranston, or either of them; and it was provided that on the failure of those parties to pay any one note thus endorsed, all the endorsements were to be considered as due, and Whiting was to be at liberty to foreclose. This mortgage as originally drawn, covered only such notes as should be drawn in the name of the firm, and was altered so as to embrace those drawn by either of the parties.

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The mortgage was executed by Cranston while he was sick, at the request of Judson, who represented to him that it was intended to secure Whiting, as an endorser on certain notes of the firm to a large amount, at the Central Bank, on which one Fowler was an endorser, the bank requiring another name in addition to, or in substitution of Fowler. Whiting had consented to become endorser on condition that the paper was to be used at the Central Bank, and he endorsed, at various times, down to the 5th of December, to the amount of \$19,500. Some \$5,000 of the notes endorsed were in Judson's individual name.

The paper thus endorsed, was not however, in fact, used by Judson at that bank, at least not all of it.

A portion of the avails of the notes were used by Judson for the hotel, and a portion for his private purposes.

As a further security to Whiting, Judson gave him individually, a confession of judgment, which was not to be entered up unless Judson became embarrassed.

In November, 1854, Cranston becoming alarmed at the financial condition of the hotel, and having ascertained that Judson had used the name of the firm, in creating liabilities, for his own purposes, commenced an action against him for the dissolution of the partnership, an account and a Receiver, and on the 27th of that month served an injunction, restraining him from further interference with the affairs of the firm.

This proceeding led to immediate negotiations between the parties, which resulted in an arrangement, consummated on the evening of the 5th of December, by which the partnership was voluntarily dissolved, and Judson's entire interest in the hotel transferred to Cranston.

It is this transaction which is sought to be impeached by the present suit.

The transaction itself was evidenced by the following papers and instruments, all bearing date December the 5th, 1854, and all executed, signed, and delivered, at the same time.

1. A memorandum of the dissolution of the firm, and that the business would be settled by Cranston alone, who was solely authorized to sign the name of the late firm in liquidation.

2. An absolute assignment under seal, by Judson to Cranston of all the former's right, title, and interest, in and to, all the

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property and effects of the firm, of every sort, kind and description. * * * * *

"3. An instrument or deed poll under seal, whereby Judson acknowledges himself to be indebted to Cranston in the sum of \$25,000, and for the security of said sum, thereby mortgages, sells, and assigns to the said Cranston, all his property, of every description, situate, lying and being, in the Brevoort House," &c. * * * *

"4. An instrument not under seal, whereby without any previous recital, Cranston agrees to employ Curtis Judson and his wife, in the New York Hotel, for and during the term of the lease thereof owned by said Cranston, and for any new term said Cranston may procure," &c. * * *

(These four instruments, which are not copied into the statement of facts found, read as follows, viz:

1. DISSOLUTION.

"The co-partnership lately existing between the undersigned, under the firm name of Judson & Cranston, is dissolved. The business will be settled by Hiram Cranston alone, who is solely authorised to sign the name of the late firm in liquidation.

"CURTIS JUDSON.

"HIRAM CRANSTON.

"Dated New York, Dec. 5th, 1854."

2. DEED OF ASSIGNMENT.

"For and in consideration of the sum of one hundred dollars, to me in hand paid by Hiram Cranston of the city of New York, I do hereby sell, assign, transfer and set over to the said Hiram Cranston, all my right, title and interest, in and to all the property and effects of the firm of Judson & Cranston, of every sort, kind and description.

"In witness whereof I have hereunto set my hand and seal, at the city of New York, the fifth day of December, one thousand eight hundred and fifty-four.

"CURTIS JUDSON, [L. s.]

"Sealed and delivered in }
the presence of }

"H. F. CLARK."

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3. DEED POLL, OR MORTGAGE, FOR \$25,000.

"Know all men by these presents: That I, Curtis Judson, of the city of New York, acknowledge myself to be indebted to Hiram Cranston of said city, in the sum of twenty-five thousand dollars, and for the security of said sum I do hereby mortgage and sell, and assign to the said Cranston, all my property of every description, situate, lying and being in the Brevoort House, corner of Eighth Street and Fifth Avenue, in the city of New York; and I do hereby authorise and empower the said Cranston to take possession of said property and effects, and sell the same, and appropriate the proceeds of such sale to the payment of said debt, which is hereby acknowledged to be due.

"In witness whereof I have hereunto set my hand and seal, at the city of New York, this fifth day of December, 1854,

"CURTIS JUDSON, [L. S.]

"Sealed and delivered in }
the presence of }

"H. F. CLARK."

4. AGREEMENT, FOR SERVICES OF MR. AND MRS. JUDSON.

"H. Cranston agrees to employ Curtis Judson and his wife, in the New York Hotel, for and during the term of the lease thereof owned by said Cranston, and for any new term said Cranston may procure; and as a compensation for their services said Cranston agrees that Mr. and Mrs. Judson and family, in consideration of the services of the said Judson and wife, to be rendered to the said Cranston, in such manner as he shall direct, and of the sum of one dollar, shall be permitted to occupy the rooms at present occupied by them in said hotel, and to have their board therein, and in addition thereto, that Mrs. Judson shall receive as a compensation for her services, a share of the profits of the business, equal to and not to exceed the rate of \$5,000 per annum; such profits to be ascertained at the end of said term and not before, and to be determined by the accounts of the hotel kept in the office, to be ascertained and reported by the book-keeper. Said Cranston does not guaranty that there shall be any such profits, nor are the said Judson and wife, or

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either of them, to have any right to an account of profits of the business, for the purpose of determining the amount of compensation to which said Mrs. Judson is so entitled, until the expiration of said term.

"Mr. Cranston does absolutely engage that so long as he remains the proprietor of said hotel, said Judson and family shall be permitted to occupy their said rooms and have said board; and in case of a voluntary sale of the said hotel properties by said Cranston, he engages to require the purchaser from him to enter into an engagement with Mr. Judson, similar to that hereby made, and upon such engagement being made by such purchaser, this agreement becomes at once void. But in the event that said Cranston shall be forced, by bankruptcy or insolvency, to give up the hotel, this agreement shall become void and of none effect immediately upon the departure of said Cranston and family from said hotel.

"Dated New York, December 5, 1854.

"Witness:

"H. F. CLARK. }

"HIRAM CRANSTON,

"CURTIS JUDSON,

"AMANDA E. JUDSON."

The statement proceeds thus:

"The condition of the affairs of Judson and Cranston, and of Judson personally, at the period of this transaction was as follows. Judson individually was indebted on account of liabilities for the Brevoort House to the amount of \$74,996,70 or thereabouts, of which a little over \$12,000 was falling due in December, 1854 (the month of the transaction in question), and the balance, with the exception of some accounts, of various amounts, amounting to about \$2,500, would mature in different proportions in nearly every month of 1855, and down to as late a period as February, 1856.

Up to this time Judson had paid all his liabilities for the Brevoort House at maturity.

The value of the property of the Brevoort House, which had cost some \$85,000, apart from any good will which it may have had, was for the purpose of a sale very much below the amount

of the liabilities incurred therefor. It was also heavily encumbered by mortgages.

Judson was also largely indebted, and under contingent liabilities to others for moneys borrowed, and for guaranties entered into for him, and among others, the plaintiff in this present action, to the amount of some \$8,000 cash. The whole amount of such liabilities exceeded \$50,000.

Apart from his interest in the two hotels, Judson had some other property, real and personal, but all of it encumbered or hypothecated to nearly its full value. On the 5th of December, if forced to a settlement with his creditors, he was individually insolvent.

The above is exclusive of his liability to Cranston in respect to the obligations created by him in the name of the firm for his private purposes, and amounting to \$25,000, as then ascertained.

There does not appear to have been any actual judgment existing against him on the 5th of December, except that confessed to Whiting, and a similar one to Slater, confessed long previously, but for what amount does not appear.

The condition of the New York Hotel was as follows:

The property, exclusive of the value of the good will of the establishment, and consisting of furniture, stock, cash, and outstanding bills, after a liberal allowance for wear and tear, and bad debts, amounted (according to the valuation thereof furnished by Cranston on the trial), to \$182,854 03. There had been some additions made to the furniture since the purchase in the spring, amounting in all to about \$8,000, and the old furniture had been repaired, so that it would not be unreasonable to add somewhat to the above total of property, but it is taken at that amount as the one fixed by Cranston himself.

The debts and liabilities of the firm, exclusive of the \$25,000 liabilities, created by Judson, in its name, for his own private benefit, amounted to \$98,834 11.

The difference between this amount and the amount of the property, is \$34,020, to one half of which, or \$17,010, Judson would be entitled, on the supposition contended for, by defendant, on the trial, that Cranston assumed the payment of the \$25,000 liabilities above mentioned.

If, however, he did not assume the payment of these liabilities,

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and such I hold to be the fact, then the account would stand thus: on the assumption that the figures of the book-keeper were correct.

The balance against Judson, made up to the 31st of December, by Brown, the book-keeper, charging him with those liabilities, was \$18,456 19." * * * * *

"In the above statement of assets is not included the value of the good will of the establishment. This included the value of the chance of a renewal of the lease, which was one of the inducements to the partnership, and as to creditors as well as between the partners themselves must be treated as a subject of value.

As evidence of the value of the good will, it is shown that the profits for the time they were in partnership, had been very large—and for the subsequent year (1855) they are shown to have been some \$35,000.

The lease expired on the 1st of October, 1855.

There was no covenant of renewal in it, but Judson and Cranston had made an application for a renewal for three years at the time they bought out Monnot, and it was, shortly after the dissolution, actually renewed in favor of Cranston, for an additional term of three years.

At the time of the dissolution, one of the notes endorsed by Whiting had become due, and was unpaid, and by the terms of his mortgage he was entitled at once to consider all his endorsements as due, and to foreclose for the whole.

A meeting was held on the morning of the 5th of December (the day of the transactions in question), at the office of Judge Whiting, at which were present Judson, Whiting, Clark, and Rose, all creditors of Judson. At this meeting Judson was strongly urged to sell out his interest to some one for a nominal sum, and Whiting was named as a purchaser, and an instrument of sale prepared for that purpose, which Judson first agreed to execute, and then declined to do so. The leading inducement urged upon Judson to come into this arrangement, appears to have been to save the hotel from the ruin, which seemed to threaten it, from its being complicated in his affairs.

He was charged with being largely indebted to the firm, and with having misused its funds, which he did not deny. Clark at this interview represented Cranston—Clark told Judson that he was hopelessly insolvent, which Judson did not deny. Whit-

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ing charged him with having deceived him, which Judson did not deny. Judson complained of the injunction as one cause of his embarrassment. He was told that the hotel could not go on in its then condition, and that if it did go on, the suit of Cranston would be pressed, a receiver appointed, and Cranston ruined as well as himself, and that it was necessary that he (Judson) should retire—some intimation was conveyed at this meeting (not by Whiting) that by executing this transfer to Whiting, he (Judson) would not only save the hotel, but secure for himself a place to live in.

The interview in the evening at the hotel lasted several hours.

There were present Judson, Cranston, Clark, Whiting, Townsend, and Mr. Rose, all the four latter were creditors of Judson or of the firm. Cranston was represented by Clark. Judson was not represented by any lawyer, though Townsend had formerly been his legal adviser, he declined to act however in this capacity on that occasion.

A statement in writing prepared from the books was furnished for the examination of the company.

At the meeting he was urged to make a transfer of his interest in the hotel, and some intimation seems to have been given to him that, in doing so he could, perhaps, arrange his individual affairs, and, succeeding in doing that, resume his position in the hotel; but he was told he would get nothing for making the transfer, as he had already drawn out all his interest.

It was alleged or shown that he had drawn out all he had ever put in, and some \$18,000 more, and that the concern was indebted over \$120,000.

Judson was charged by Whiting with having deceived him, and told that he (Whiting) had lost all confidence in him, and that he would foreclose his mortgage unless some arrangement was made.

Cranston offered to sell out if he could be secured against the debts.

Whiting expressed a willingness to assist Cranston if the latter could get the lease renewed; but only on consideration of Judson's withdrawing from the concern.

Judson was urged for some stipulation or agreement that he should be taken back again (as a partner) when he had got

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released from his creditors, but this was refused." * * * * *

"No agreement to that effect was in fact made. To an inquiry of Judson on this matter, some answer was given that there would be no objection to taking him back if his debts were paid.

It was not urged as a reason for Judson's making a transfer of his interest, that otherwise he would be troubled with his private creditors.

It was conceded that the house could not get on without resources from outside.

Some \$30,000 or \$40,000 were mentioned, as the amount necessary to carry it on.

It was a conceded thing among all present, that Judson individually was insolvent.

Nothing was said about the renewal of the lease.

There was some verbal understanding or expression of an agreement, on the part of Cranston, that on the transfer being made to him, he would assume and pay the debts of the firm, as also those contracted by Judson, in its name, for his own purposes, as far as the same were then ascertained.

No writing to this effect was given, however, either to Judson or the creditors, nor any indemnity furnished to prevent other parties from coming in and getting the property, as judgments to a large amount would be obtained against him as soon as it was known that he had transferred his interest to Cranston.

Cranston, in his answer to the complaint in this action, says, that the mortgage was given to secure him such an amount as on an accounting between him and Judson should be found due to him in respect to the moneys drawn out by the latter and the liabilities contracted by him in the name of the firm, but for his own use and benefit.

It is a conceded fact in the case, that Cranston is now proceeding with his suit to have the accounts stated.

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The object of this was to secure to Judson and his wife a provision for their support, and the compensation was made payable to her with the avowed object of keeping it from the reach of his creditors.

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The agreement for employment was the result of a conference between Judson and Cranston between the meetings in the morning and evening of the 5th of December.

It was considered that the services of Mrs. Judson would be valuable, and that Judson himself, might be very usefully employed. Her services were considered valuable in superintending the domestic arrangements.

At the interview in the hotel Judson was much depressed and weighed down in spirits.

Notice of the dissolution was immediately after the 5th of December, advertised by Cranston in four of the principal newspapers published in the city of New York.

Cranston, since the dissolution, has in fact assumed the payment of some of the debts created by Judson against the firm, among others, of Whiting's, and Turner's, and Bininger's, and has since carried on the hotel by procuring an extension from its creditors, and by assistance from Whiting in increased endorsements to a large amount, and assistance from other friends.

To what extent the debts have been paid does not appear.

Some days after the fifth of December, Judson had an interview with Bininger, one of his creditors, to whose firm of Bininger and Clark he was indebted some \$6,700, and told him that he had sold out his interest to Cranston, and that on the writing up of the books he hoped there would be a balance in his favor, and which he then assigned to his said firm.

This assignment is in writing, dated the 9th of December, 1854, signed by Judson, and acknowledging an indebtedness of 3,000 dollars, in consideration of which he sells and transfers to the firm of Bininger & Clark, some shares of stock, 'and also all his right, title, and interest in the New York Hotel, and the proceeds of the business thereof.'

Subsequently, on the 15th of December, he transfers to Bininger & Co., on account of his indebtedness to that firm of 6,700 dollars, the agreement between himself and wife with Cranston for their services, and agreeing to perform the services contemplated in the agreement—Bininger to apply as much as he could collect, under the agreement, or by a sale thereof, on said debt. Mrs. Judson ratified this arrangement.

After this, an arrangement was made between Bininger and

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Cranston, and, on the tenth of February, Cranston was released from his said engagement with Judson and wife. Judson was discharged from his debt to Bininger and left the hotel, and Judson and his wife ceased to render any services, under the agreement of December 5th.

Cranston gave a consideration for the release from Bininger, of the agreement for services assigned to him by Judson, viz: Cranston's obligation to pay Bininger 6,000 dollars, absolutely at the end of three years."

Thereupon the Court rendered a judgment, which, exclusive of its recitals, reads thus, viz.

"It is ordered and adjudged, that the complaint herein be dismissed as to the defendant, George Slater; it appearing that he has no interest in the matters in controversy herein.

And it is further found and adjudged that judgment was recovered and docketed in favor of the plaintiff against the defendant Judson, and execution issued thereon, and returned wholly unsatisfied; as is in the complaint in this action alleged; and that the whole amount of said judgment is still due and unpaid to the said plaintiff.

And it is further found and adjudged, that the defendants, Judson and Cranston, were partners together, in the keeping of the New York Hotel; as is alleged in said complaint, and as co-partners were possessed of the furniture and fixtures in the pleadings, and of a lease of the said Hotel which expired on the 1st October, 1855.

And it is further ordered and adjudged that the transfer or assignment made by the said Judson to the said Cranston of his partnership interest on the 5th of December, 1854, mentioned in said pleadings, was made with the intent to hinder, delay and defraud the individual creditors of the said Judson, and the said plaintiff as one of such creditors, to whom the said Judson, then owed the debts for which said judgment was recovered.

Wherefore the said transfer or assignment is hereby adjudged to be fraudulent and void as against the individual creditors of said Judson, and as against the plaintiff as such individual creditor as aforesaid.

And it is further found and adjudged that the mortgage from the defendant Judson to the defendant Cranston for twenty-five

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thousand dollars, and the agreement for services between the said Cranston and the said Judson and his wife, both bearing date on the said fifth December, 1854, and executed and delivered contemporaneously with the said transfer or assignment by said Judson to said Cranston, and the agreement or stipulation for a dissolution of the copartnership between the said Cranston and Judson, executed at the same time, with the said transfer or assignment and mortgage, and agreement for services, constituted together with the said assignment one single transaction; and that said mortgage and agreement for services were as well as the said assignment or transfer by said Judson to said Cranston of his interest in the said partnership property, made with intent, to defraud, hinder, and delay the individual creditors of said Judson, and the plaintiff as such individual creditor, and as against such creditors, and the plaintiff are void; but whether the said partnership ceased as between the said Judson and Cranston, or as against the creditors of the said Judson on the said fifth of December, 1854, is a question reserved until the coming in of the Report of the Referee on the taking of the accounts hereinafter ordered.

And it is further ordered that it be referred to Hamilton W. Robinson, Esq., to take and state an account of the said copartnership from the commencement thereof to the present time, and of all its properties, assets, and effects, and of all the partnership dealings and transactions between the said co-partners as is hereinafter particularly directed, and that in his report of the properties of the concern, he include the good will of the business, and of the new lease of said Hotel, now held by the said Cranston as hereinafter directed.

And it is further ordered that in taking said account the said Referee do make a rest at the date of the said 5th December, 1854, and ascertain and report the state of the accounts at that date." (Here, follow directions, as to the matters to be included in such account.)

"And it is further ordered that the said Referee, after ascertaining the state of the accounts on the 5th December as above directed, state an account of the collections and payments made by said Cranston or his agent since that date in settlement of the affairs of the partnership, as a partnership terminated at that

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date; and of the amount of outstanding liabilities and debts and uncollected assets, if any, so as to show the state of the partnership accounts at the present time.

And it is further ordered, that in continuing the account to the present time, the said referee do, for the purposes of the account, consider the partnership as still subsisting, and that he estimate the value of the property, including the now subsisting lease and the good will of the concern at the date of his report, and state an account of all the outstanding debts and liabilities created by said Cranston in the business, since said 5th December, 1854, and of all receipts and profits made since that date, and of all monies advanced, paid, and expended, by said Cranston, in conducting the business of the concern, distinguishing those advanced out of his individual funds or resources, and those appropriated and expended out of the assets or collections of the partnership; and that he report what would be a reasonable allowance to be made to the said Cranston, if any, for his time, labor and services, in and about the conducting of the business since the said 5th of December, 1854.

And it is further ordered that the said referee do report what balance, if any, was due to the said Judson, as between himself and the said Cranston, on the said 5th December, 1854, and what was the value of the surplus interest, if any, of the said Judson, as copartner in the property and assets of the firm at that date; and also what is due, if any thing, to him at the date of his report; and what is the value of his said surplus interest, if any, at the latter date; and that he state what, if any interest, should be allowed in favor or against either of said parties in such account."

* * * * *

(Here, follows a provision that the parties attend, and be examined, &c., on such accounting.)

"And it is further ordered, that unless within ten days after the entry of this judgment, the said Hiram Cranston do execute a bond with sufficient sureties to be approved by the Court, to pay to the plaintiff herein, whatever shall, on such accounting, appear to be the value of the interest of the said Judson in said copartnership property, at the date either of the 5th December, 1854, or of his report, as the Court shall ultimately determine him to

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be entitled to, including such balance of moneys or profits, as shall at such date be found due to him, to the extent at least of the said plaintiff's judgment, interest and costs, if the value of said interest and the amount of such balance shall amount to so much; or shall in lieu thereof deposit in this Court, within the period aforesaid, an amount equal to the said judgment, interest and costs, to be determined by the Court, to remain on deposit subject to the order of the Court; that then the said referee do appoint a receiver of the said New York hotel, its property, assets and effects, and take from such receiver the requisite security." (Here follow various provisions in respect to the powers and duties of such receiver.)

"And it is further ordered, that either party, as also the said receiver, be at liberty to apply to the Court at any time, at the foot of this order, for further directions."

The case contained no statement of the conclusions of law, except the paper called the "Judgment."

Cranston filed, in due time, exceptions to the decision of the Court, some being to decisions of fact, and others to decisions of law.

The printed case contains the opinion of the Court, accompanying the decision of the action at Special Term, from which the following are extracts: viz.

"In examining the transaction as finally consummated, all the several instruments by which it was evidenced must be considered as one, it being clear on the testimony that they were not only all contemporaneously executed and delivered, but that no one of them would in fact have been executed without the other." * * * *

"The whole affair was begun and consummated under the urgency of fear and apprehension. The parties all acted, Judson included, on the assumption that he was largely the debtor of the concern, and had more than drawn out and realized all his interest in it. Yet, as the evidence of the book-keeper would indicate, it is by no means certain, that even if charged with the whole \$25,000 of liabilities created by him in the firm's name, for his own benefit, he had not at that time some interest of value remaining.

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"There was one item of property which was entirely overlooked, or disregarded, in the estimates which were made of the condition of the hotel, and that is what is called the good-will of the establishment, by which I mean:

"*First*, The interest which the partners had in the renewal of the lease (then shortly to expire), and which, notwithstanding there was no covenant of renewal in the old lease, had nevertheless a potential existence, and was in equity 'a valuable and vendible interest;' a renewed lease is in equity considered as a continuance of the original lease, so far as the equitable rights of third parties in the old lease are concerned. (*Phyfe v. Wardell*, 5 Paige 268.)

"*Second*, The advantage arising from the established reputation of the house and its local position, which though not a tangible interest, nor one susceptible of division between the partners as a piece of property, was yet a benefit which would unquestionably enhance the sale of the property, and therefore a proper subject of appreciation on determining the value of Judson's interest. (Story on Partnership, § 99.)" * * *

"Neither in the absence of any written undertaking to that effect am I at liberty to say, that the assumption by Cranston of the firm debts proper, constituted the consideration for this transfer, nor that any such assumption took place. That Judson may, from expressions used at the meeting in the evening of the 5th of December, have understood that they would be paid by Cranston, is very probable, but there is nothing to conclude the latter on that point. Judson has no guaranty or indemnity against these debts. The parties undertook to reduce the whole transaction to writing—so essential a part of it as the assumption of the partnership debts by one of the parties, if it existed, in fact, should also have been embodied in the same or some other instrument. That it was not so must be held to be conclusive evidence that no such assumption was, in fact, undertaken by Cranston. It is a rule both in equity and at law, that a contract cannot rest, partly in writing and partly in parol. (2 Story's Eq. § 767; Greenf. Ev. § 275-6; 1 J. C. R. 273; 14 J. R. 15.)"

* * * * *

"Second, what was the character and nature of this agreement for the services of Mr. and Mrs. Judson?

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"There is one aspect of it, which I think of itself fatal to it.

"It is a clear attempt to secure to the use of a debtor, the fruits and earnings of his future exertions, so that they cannot be reached by his creditors." * * *

"Upon the whole case I am clear that the transaction of the 5th of December operated as a fraud on Judson's creditors, and cannot be sustained.

"It matters not that Judson was in fault, or that Cranston's private motive was a desire to save himself. In the eye of the law he was not an innocent party; he knew of the condition of Judson's affairs, and knew, or must be presumed to have known, the necessary effect of the arrangement on his creditors; indeed, the avowed object of the transaction was too plainly expressed to excuse any party to it on the ground of ignorance. That object, as respects the creditors of Judson, was a fraudulent one, and the method adopted to carry it out operated equally to defraud those creditors, and I do not feel at liberty to uphold the transaction.

"The sale to Cranston must be set aside as void, and also the mortgage and agreement for services; and there must be a reference to take and state the accounts of the partnership up to, and including the 5th of December, 1854, and of the transactions of said Cranston in the conduct of said hotel since that time; a Receiver also must be appointed, and plaintiff must have judgment for his debt out of any surplus which on such accounting may be found to belong to said Judson.

"The form of the judgment to be settled by the Court."

From the "statement of facts," and the "judgment," contained in the case, some portions have been omitted, but the phraseology of the foregoing parts of them has not been changed, in any respect.

The defendant, Cranston, appealed "from all and every part of the judgment or order in this action, dated the eleventh day of October, 1856, except that part thereof which dismisses the complaint herein as against the defendant, George Slater."

Such appeal was taken, argued, and decided before the reference ordered had been taken, and before it had been decided

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whether the partnership was to be deemed to have been dissolved on the 5th of December, 1854.

James W. Gerard and *H. F. Clark*, for Appellant.

D. D. Field, for Respondent.

BOSWORTH, J.—This action is brought by an individual creditor of Judson, having a judgment against him on which an execution has been issued and returned unsatisfied, to set aside a transfer of property made by Judson to Cranston. The transfer was made December 5th, 1854. It was a transfer by Judson of his interest, as a partner of Cranston, in the lease and premises, known as the New York Hotel, with its stock, furniture, fixtures, and the good will of the business. The transfer is sought to be set aside on the ground that it was made without consideration, and with intent to hinder, delay, and defraud the creditors of Judson.

Whether the transfer was made with such an intent is a question of fact and not of law.

The printed case, in addition to the pleadings and evidence, contains a formal statement of the conclusions of fact, which the Court found to be established by the evidence.

The case then proceeds to state, that, "thereupon the Court rendered the following judgment."

Unless the conclusions of law are embodied in and enunciated by the "judgment," they do not appear in the printed case. If that, which is called in the case a "statement of the facts," "established by the evidence," contains a statement of every conclusion which the Court found as a conclusion of fact, then the conclusions enunciated in the "judgment" should be regarded as the Court's "conclusions of law" upon the special facts so stated to have been found. The only conclusions stated in the judgment, which should, under such circumstances, be treated as conclusions of fact, and to have been intended to be so stated, are those, which, when found at all, must, from their nature, have been necessarily found as facts.

In this view, the Court held, as legal conclusions from the facts stated to have been found, that the transfer by Judson, of

his interest in the New York Hotel, was made with intent to defraud his individual creditors.

That the four instruments of the 5th of December, 1854, were "one single transaction," and were made with intent to defraud the individual creditors of Judson. It is quite obvious from the opinion of the Court, that these were found as conclusions of law.

In the statement of the facts which the Court found to be established by the evidence, it is not found as a fact, that either of the four instruments was made with intent to hinder, delay, or defraud any one.

The only thing, as to the intent of the parties, contained in the statement of facts, is, that the compensation agreed to be paid for the future services of Mr. and Mrs. Judson "was made payable to her, with the avowed object of keeping it from the reach of his creditors."

It is necessary, in order to present this case properly, to advert to some of the controlling facts, as the Court found them, and as we may think it ought to have found them—on the evidence before us.

These four instruments were executed and delivered on the 5th of December, 1854. At that time Cranston had instituted an action to obtain a dissolution of the firm, in consequence of the misconduct of Judson, and had obtained and served on him an injunction, prohibiting him from interfering with the business or property of the firm.

The Court had no right, under such circumstances, to find or conclude that Cranston would not have accepted of the agreement for a dissolution, even if no other agreement could have been obtained from Judson. If he could have obtained no other he would have accepted of that, and closed the business as he thought best, or might be able, and have had the rights of himself and Judson adjusted, in the action brought for the purpose and then pending.

The Court found correctly that Judson had borrowed, on paper made by him in the firm's name, \$25,000, most or all of which he had used for individual purposes, and that this was done without the consent or knowledge of Cranston.

That charging Cranston with the value of the co-partnership

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assets, and crediting him with the balance due to him for capital contributed and not drawn out, and also with the debts owing by the firm, including this \$25,000, on the assumption that he had undertaken to pay them, Judson would be a debtor of the firm to the amount of \$6,308 98.

If it be true that Cranston, in consideration of the transfer to him, by Judson, of his interest in the hotel, agreed to pay, either absolutely, or, in the first instance, all the debts owing by the firm, and also this \$25,000, and if it be true, that in taking the property at the estimated value of \$132,354 03, he took it at its full and fair value, and for more than could be got for it at public or private sale, then it was impossible that any individual creditor of Judson could be defrauded by it. If on such a state of facts it was the intent of the parties to defraud the individual creditors of Judson, it was an intent which could not be carried into effect, for the reason that the whole interest of Judson was insufficient to pay his proportion of the partnership liabilities, and the amount owing from him to his co-partner on a correct adjustment of their co-partnership business.

It is, in our opinion, of vital importance to ascertain the truth in relation to this branch of the case, and proceed from it, as a point of observation, to consider the other issues of fact presented by the pleadings.

The Court found that in estimating the property and assets of the firm at \$132,354 03, the good will of the establishment and of its business was not estimated and included.

In this, we think the Court erred. Cranston, on the dissolution, purchased the good will, in the same sense, and as absolutely, as a matter of fact, as the firm had previously purchased it of Monnot.

In each instance the property was valued, not with reference to the prices it would be worth to use anywhere, or to sell again, or for which like articles could be bought from those who kept them for sale, but with reference to their then position and use, and the advantages of continuing the business, in the prosecution of which they were then employed, with the prospects then existing as to its future duration at the same place.

We think no one will pretend, for a moment, upon the evidence brought before us, that Cranston, or any one else, would

have paid anything like \$132,354 02 for this property, with the certainty that it must be removed at once, or as soon as it could be conveniently done, and used elsewhere.

We must, therefore, in considering and passing upon the merits of this controversy, regard all of the goodwill of the establishment, as estimated and included in the sum of \$132,354 03.

The Court found, as a fact, that Cranston did not assume the payment of the \$25,000.

We think this conclusion is erroneous. The testimony is explicit that Cranston did agree with Judson, to pay it. He was liable to pay it, and could not avoid paying it, if his means were sufficient to pay it.

If clear verbal proof of the fact, that Cranston agreed to pay the \$25,000, is competent evidence to establish it, and if a finding of such a fact contrary to the effect of clear and explicit verbal evidence in relation to it, is erroneous, then it was incorrectly found, that Cranston did not agree to pay the \$25,000.

Then the case stands thus; Judson transferred his interest to Cranston, and the latter agreed to pay more than Judson's interest was worth. He paid more than it was worth, including the good will, of the existing business viewed as one to be continued, if we are to determine its worth by any reliable estimate of it disclosed by the evidence.

Whether Cranston agreed to pay all the debts absolutely including the \$25,000, without recourse to Judson for any balance that would be due on a proper accounting, or whether he merely agreed to pay it, in the first instance, retaining the liability of Judson for any balance that might be found due from the latter, upon a fair and proper adjustment of the accounts, is a matter of no consequence, irrespective of other facts, so far as the question of an intent to defraud the individual creditors of Judson, by making such transfer is involved.

In either aspect, nothing was transferred to Cranston, to which the individual creditors of Judson had any right. It all belonged equitably, to the creditors of the firm. The transfer was made with the intent, and to the end that it should be so applied.

It was, therefore, as the case is presented by the evidence before us, a physical and legal impossibility that the individual

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creditors of Judson, should be defrauded by such a transfer, and application of Judson's interest in this property. To find an actual intent to defraud, under such circumstances, the evidence of it should be too cogent to be resisted.

If the Court had found these facts, as we think the evidence establishes them, and had not attached any consequence to the consideration that Cranston's agreement to pay the debts including the \$25,000, was not in writing, but was verbal merely, we cannot think it would have found the transfer to have been made, with an intent to defraud the individual creditors of Judson, unless there are other facts, not yet adverted to, which warranted such a conclusion.

So far as we have now advanced in considering the case, we think the conclusions just, that the dissolution was a result to which Cranston had an absolute right, and one upon which he would have insisted at all events, and that the transfer of Judson's interest was made upon a full and adequate consideration, and that the property transferred was insufficient to pay Judson's proportion of the copartnership liabilities, and that it was impossible to have defrauded Judson's individual creditors thereby; that the conclusion that the transfer was made with such an intent is unnatural, and not warranted by the facts thus far stated.

The Court also found, that no agreement was, in fact, made, to the effect, that Judson would, or might be taken back as a partner of Cranston, in this business, if he should succeed in making an arrangement with his creditors.

One of the agreements of the 5th of December, 1854, stipulated that Cranston would employ Judson and his wife, during the term of the then existing lease, or of any renewal of it which Cranston might obtain, and so long as he should continue proprietor of the hotel, and pay for their services, in addition to boarding them and their family, and allowing them to use the rooms they then occupied, at the rate of \$5,000 per annum, if the profits amounted to that, but such profits were not to be paid, until the end of the employment, nor unless on an accounting then had, it should be ascertained that that amount of profits had been made.

In considering the degree of importance which should be attached to this contract, and the effect that should be given to

it, it should be kept constantly in mind, that Judson had fraudulently involved the firm in liabilities; was individually insolvent, and that his whole interest in the partnership effects, was insufficient to pay his proportion of the partnership liabilities including the \$25,000.

His agreement to render future services, was not a transfer of existing property. Those services he might refuse, or become unable to render. A failure or refusal to render services would be an end of that part of the contract.

Unless profits were made, he would receive nothing for the services of himself and wife, beyond the board and lodging of themselves and family. The \$5,000 per annum, if it should become payable, would be payable out of property to be subsequently acquired by Cranston, and by reason of the future profits of his business equalling that sum. Neither the then creditors of Judson, nor his future creditors, would have any right, legal or equitable, to so much of his earnings from time to time, as might be required for the support of his family.

Whatever a debtor may have earned within sixty days preceding an order, that he apply his property to the payment of his debts, which may be necessary for the use of a family, supported wholly or in part by his labor, is by law placed beyond the reach of his creditors. Code § 297.

Judson, by this agreement, did not acquire a right to the use of any property for an hour, unless, and except upon the condition that, he should continue to render services of more value, than the use of such property.

It placed him in a position that, by performing his part of the contract, he might support his family, and if the business was prosperous, might earn something in addition. But whatever he might earn, was not to be earned at the expense or prejudice of his existing creditors.

It is not a case, justifying the inference, that a debtor has transferred his property upon terms which are unjust or inequitable as it respects his creditors, on the condition of obtaining, wholly or in part, a future support out of it, and as a part of its price.

If it might be found, properly, upon the evidence, that Judson made the execution of the transfer of his interest depend upon the fact that such an agreement for the employment of himself

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and wife was made, instead of its being necessarily evidence, under the peculiar facts and circumstances of this case, that he transferred such interest, with intent to defraud his individual creditors, it would be evidence that in addition to obtaining for the interest transferred more than it was worth, and in a way just to his creditors, he availed himself of the embarrassments of Cranston, occasioned by his own misconduct, to extort from Cranston's apprehensions of being reduced to personal insolvency, if the property should be sold and the business closed by a receiver, a bargain which Cranston's hopes of the future, and his fears of the present, would alone induce him to make.

That agreement, whatever it was, was assigned to an individual creditor of Judson, within nine days of its date, and Judson at the time covenanted with such creditor to perform the services which it bound him to perform. Mrs. Judson assented to the transfer. That may not be a fact of much legal import; but in judging the intent of parties from their acts, it should not, perhaps, be wholly overlooked.

So far as the fact of this transfer illustrates the intent of Judson at the time, it tends to show an intent, after having provided for the payment of all his copartnership liabilities, to make the future services of himself and his wife subservient to the claims of his individual creditors, and pledge them, in advance of their being rendered, to pay individual debts.

The individual creditor of Judson, to whom this contract was assigned, compromised with Cranston all claims that he could ever have under it, and, with the assent of Judson and wife, released Cranston from all liability under it, and they thereupon left the hotel. The release was made on the 10th of February, 1855.

The effect of that branch of the transaction was after providing for the payment of the creditors of the firm, by means which they have adopted, and in a manner of which they have approved, to secure payment of an individual creditor, to the amount of \$6,000, without Cranston's having received any equivalent for the \$6,000, unless he found it in being released from all connection with Judson.

We think the fact of making this agreement with Judson, for the services of himself and wife, considering the peculiar

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circumstances under which it was made, furnishes no satisfactory evidence that Judson transferred his interest in the hotel, with intent to defraud his creditors. That the transfer of this agreement, on the 10th day after its date, to an individual creditor, accompanied by his covenant to perform the services which he was bound to render, to entitle him to anything under it, repels the idea of its being the actual intent of any party to it, at the time it was made, to defraud the individual creditors of Judson.

That the Court is not justified in finding, as a conclusion of law, an intent to defraud, against clear evidence that the actual intent was honest, and that the transaction was one by which the individual creditors of Judson could not be defrauded.

If these views are sound, there is nothing in any part of the transactions to justify the conclusion of an actual intent to defraud the individual creditors of Judson, unless it can be found in the instrument, called the mortgage for \$25,000, and the facts established in relation to it.

On this appeal, our first duty is to determine, whether the facts found are warranted by the evidence. When we have determined what facts, as found, are warranted by the evidence, it then remains to be considered, whether the facts correctly found are sufficient to uphold the judgment, or order, however those erroneously found might properly be found, upon any evidence which could be given. If the facts correctly found, are not, when thus viewed, sufficient for that purpose, the judgment, or order, must be reversed.

The Court, on appeal, is not at liberty to find such facts, as the evidence, in its judgment, may establish, and pronounce judgment according to their legal effect. When its finding of facts differs from that of the Court at Special Term, the Court must necessarily order a new trial, when material facts are erroneously found.

The allegation of the answer, in respect to the mortgage, is, or clearly implies, that although Cranston had assumed to pay the \$25,000, in the first instance, as well as the legitimate debts of the firm, yet there was to be an accounting between him and Judson, and, on such accounting, Judson would be largely indebted to Cranston, and that the mortgage was given to secure

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such indebtedness as should, on such accounting, be found due from Judson to Cranston.

The Court has not found, among its conclusions of fact, for what purpose it was made. It does not appear from the conclusions of fact, which the Court held to be established by the evidence, whether it was executed for such a purpose, as the answer affirms, or whether, as was contended on the argument of this appeal, it was executed to indemnify Cranston against liabilities then undisclosed, which, it was feared, Judson might have created by a fraudulent use of the firm's name, and which would be asserted and enforced against Cranston, or whether it was made for some other and different purpose.

If made for either of the two purposes first named, it is not claimed that such purpose, of itself, would make the transaction fraudulent. It is conceded, as we understand the argument made, that if it appeared clearly, that it was made for either of those purposes, and such purpose was disclosed by the terms of the mortgage itself, it would not only be no evidence of a fraudulent intent, but, on the contrary, the mortgage would be valid.

If that be so, then the question might arise, whether Cranston is at liberty, as against the creditors of the mortgagor, to show the real purpose, and have the transaction determined by its real character and according to the actual intent of the parties; or, whether there is something in the terms of the instrument which demonstrates a fraudulent intent, which no parol evidence of actual intent can be permitted to overcome. That question we deem it unnecessary to decide on this appeal—for reasons subsequently stated. The "opinion" of the Court at Special Term, shows that the Court came to the conclusion, that this mortgage was executed to secure Cranston against such liabilities as had been fraudulently created by Judson in the firm's name for his private benefit, and which, as then ascertained, amounted to \$25,000.

But it does not appear by the facts found by the Court, that the Court came to that conclusion.

The mortgage is good on its face. That it was made and accepted with an intent to defraud the individual creditors of Judson, must be established, if at all, by proof of facts not indicated by the terms of the mortgage.

It is not found, by that part of the case which professes to state the Court's conclusions of fact, that it was made with an intent to defraud.

It was found that the transaction sought to be impeached by this action, was evidenced by the four instruments, all executed, signed and delivered at the same time.

But that does not enable us to reach the conclusion, that the transfer of Judson's interest in the partnership assets, was, in fact or intent, a fraud upon the creditors of Judson. We have already stated our conclusion, that neither of the other three instruments, in connection with the facts proved, furnish evidence sufficient to justify the conclusion of an intent to defraud. The mortgage, looking only at its face, is no evidence that the mortgage or the other papers were executed with such an intent.

To justify the inference, that even the mortgage itself was executed with that intent, it is indispensable that facts justifying that conclusion should be proved and found as facts by the Court.

We think there is no ground, on the evidence before us, to pretend that Judson would not have executed the other papers signed by him, if he had not been asked to execute the mortgage, nor that Cranston would not have taken the agreement for a dissolution, and the instrument of transfer, and have executed the service paper (as it is called), although Judson might have absolutely refused to execute the mortgage.

It is not found, that the execution and delivery of the mortgage was made a condition of the executing and delivery of the other papers, or of either of them.

But, assuming the mortgage to be invalid as against the individual creditors of Judson, is it necessarily so complicated with the transfer of his interest in the New York Hotel, as to form an essential part of the intent of making that transfer, and thus vitiate the latter, although the latter was clearly made for equitable purposes, and with an actual honest intent?

The property mortgaged is entirely distinct from that transferred. It was not mortgaged to indemnify Cranston against any liability which he assumed to satisfy, as a consideration for such transfer, nor to furnish him with means to discharge such liabilities. If it was given to secure any balance that might be

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due from Judson on a proper accounting, or to indemnify him against any liabilities fraudulently created by Judson in the firm's name, and then undiscovered, it was given for a lawful purpose and to secure an individual debt, in respect to which the claims of Cranston were as meritorious as those of any other individual creditor of Judson.

The mortgage and the instrument of transfer do not, in terms, refer to each other, nor relate to the same subject matter. They relate to entirely distinct and disconnected items of property. The one to property owned by Judson individually, the other to property owned by him and Cranston as partners. If the mortgage was in fact given, and if it shall be so found upon competent evidence, to indemnify Cranston against liabilities then undiscovered, which Judson had fraudulently created for his own purposes, the object of it would have no connection, in fact, either with the transfer of his partnership interest, or with the consideration paid for such transfer, if the transfer was absolute on Cranston's assumption to pay the just debts of the firm, and the \$25,000 without recourse to, or any claim upon Judson, for any balance that would be due from him upon a proper accounting.—2 Denio, 130, *Cornell v. Todd*. 1 Kern, 315 and 319-320, *Craig et al. v. Wells*.

If, on the other hand, it should be made to appear that the mortgage was given to secure what might be found due to Cranston upon a just accounting, as of the 5th of December, 1854, and that Cranston's assumption of the debts of the firm and of the \$25,000, was an assumption to pay them in the first instance merely, with a right to an accounting in respect thereto and of the whole copartnership business, then it would seem that it must necessarily follow that the mortgage and transfer would relate to the same matter, namely, the security and indemnity of Cranston against the liabilities he had assumed, and agreed to pay in consideration of the one, and upon the security of the other.

In the *Bank of Utica v. Finch*, 3 Barb. Ch. R. 293, it was expressly held, that a mortgage which, by its terms, was given "to secure the payment of \$30,000 paid to the parties of the first part by the party of the second part," might be shown to have been given to cover the liabilities of the mortgagor to the bank; (the mortgagee,) from time to time, including new discounts and

renewals of paper and subsequent loans. And on proof of that fact, the mortgagee was permitted to enforce the mortgage for its full amount, although, of the debts covered by it, when the defendant's equities attached, not over \$8,000, consisted of liabilities existing at the time the mortgage was executed.

If that case is law, it necessarily follows, that this mortgage was not void, or ineffectual as between the parties to it, merely because its face did not disclose the precise debts or liabilities, or the nature of the debts and liabilities, which it was given to secure.

It may have been made with an actual intent to defraud, but that is not the point now under consideration.

The broad question is this, is Cranston precluded by the terms of the mortgage from showing that it was made for a legitimate purpose, and with honest motives, the precise purpose being one which its terms do not disclose? If he is not, then, it is insisted that the ultimate question must be one of actual intent, to be decided upon the actual facts of the case as they shall be established by evidence, and not upon the terms of the mortgage alone, with proof merely, that there was no existing debt of \$25,000, then due from Judson to Cranston.

If the *Bank of Utica v. Finch* be law, then it was competent for Cranston, as between himself and Judson, if \$25,000 of paper fraudulently issued by Judson in the firm's name, had been subsequently disclosed and paid by Cranston, to have filed a bill, alleging the mortgage and the facts, and on proof of the facts he could have enforced it, to reimburse himself the \$25,000. And it is contended, if this be so, that the mortgage, whether it is or is not a part of the same transaction as the transfer, would not necessarily make the latter void.

Jackson v. Brush, 20 J. R. 10, is not in conflict with the *Bank of Utica v. Finch*. The former presented the case of a deed to two grantees absolute on its face. The pretence made in support of it was, that it was executed to secure a debt owing by the grantor to one of the grantees, and to enable them to sell the property, and pay the grantor's debts, and render the surplus to him, if there was any.

A verdict was taken, subject to the opinion of the Court, on a case containing the evidence. The Court held that the deed

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was executed without any consideration, and when the grantor was largely in debt, and of course, that it was made with intent to hinder, delay, and defraud creditors. But the Court was careful to say (p. 11) that "if this deed had been given to Livingston (the creditor), alone, to secure the alleged debt of \$300, and the existence of that debt at its date had been shown, it would present a different case."

In *Darling v. Rogers*, 22 Wend. 483, where an assignment, upon trust to sell or mortgage, was assailed by a judgment and execution creditor of the assignor, the Court upheld the assignment, although the trust to mortgage was conceded to be void. An honest actual intent having been found, and the trust to sell being valid, the Court of last resort held itself bound by the statute to carry the deed into effect, according to the intent of the parties, so far as that intent could be seen, and was consistent with the rules of law. (1 R. S. 739, § 2.)

An assignment, made by an insolvent, of his property, upon trusts prohibited, and by law declared to be void, may, not unreasonably, be deemed to furnish some evidence that it was made, with intent to hinder, delay, or defraud creditors.

There is a great difference between an assignment of property to a third person in trust, and a transfer of it to a creditor by way of security or mortgage. The effect of the one upon the legal rights and remedies of general creditors, is very different from that of the other.

In the first case, the title is vested in trustees, and those not provided for, if compelled to wait until the execution of the trust, in order to reach the surplus, as they would be if it was upheld, would necessarily be hindered and delayed, and the property to which they would be entitled would be withdrawn from the reach of process, pending the execution of the trust.

But when property is mortgaged to a creditor, the mortgagee only acquires, in equity, a specific lien upon it. The residuary interest may be reached by bill in equity, or by execution, according to its nature. The creditor is not obliged to postpone action until the determination of a trust, or for a single moment. He is not, therefore, hindered or delayed, in a legal sense. He has only been postponed to creditors as meritorious as himself. (*Leitch v. Hollister*, 4 Coms. 211.)

The argument in support of the rights of the mortgagee to show the actual purpose and object of the mortgage, notwithstanding the falsity of the consideration stated in it, is, that as the mortgage is valid on its face, whether it is fraudulent or not is a question of fact, to be determined upon all the facts of the case, as to the real purpose and motive with which it was made.

That it does not disclose on its face the nature or actual extent of the liabilities it was given to secure, may be a circumstance with others, or of itself, to show a fraudulent intent.

An attempt, or assertion of a right or purpose to enforce it, contrary to its real object, and adverse to the just rights of the individual creditors of Judson, would also be evidence on the question of an actual intent to defraud.

But if it be true that it was given for a purpose which the law approves, and if it be true that a court of equity would allow the truth to be alleged and proved, and would thereupon give it effect accordingly, as between the parties to it, then it is argued that it can only be avoided by its appearing upon the whole evidence that it was made with an intent to hinder, delay, or defraud the creditors of Judson.

"The question of fraudulent intent, in all cases arising under the provisions of" the chapter of the R. S., entitled "of fraudulent conveyances and contrasts, relative to real and personal property," "shall be deemed a question of fact, and not of law." (2 R. S. 137, § 4.) The terms of a transfer, it must be admitted, may furnish satisfactory evidence of such an intent, and be alone sufficient to warrant the finding of that fact.

But it is insisted that when the instrument assailed is good and valid, so far as it is affected by matters appearing on its face, and as the existence of a fraudulent intent depends upon extrinsic facts to be proved, all evidence in relation to the objects and purposes of the instrument should be received, which would be admissible in an action to enforce it to secure results not provided for by its terms, but upon settled principles, held to be consistent with it.

Having come to the conclusion, that the mortgage was executed to secure Cranston against undiscovered liabilities, which he had just grounds to apprehend Judson might have contracted fraudulently in the firm's name, and that the transfer of Judson's

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interest in the partnership effects was absolute, and upon adequate consideration, and was made with honest motives and for just purposes, the mortgage, as the evidence now stands, had no such connection with the transfer in fact, or in the intent of the parties, as necessarily to avoid the transfer, even if the mortgage could not be upheld as to the property it covers.

It, therefore, becomes unnecessary to the disposition of this appeal, upon the evidence which it brings before us, to decide whether as against the creditors of the mortgagor, the falsity of the consideration stated would be evidence *prima facie*, or conclusive, of a fraudulent intent in making it.

That question is one of great practical importance, and we do not deem it expedient to express any opinion in relation to it, as the decision of it is unnecessary in order to dispose of this appeal, or so far as we can now discover, for the re-trial of this action.

It is proper to observe, that the Court should have disposed at the trial absolutely of all questions of liability, and the reference should have directed only such details to be ascertained as were necessary to be known to carry the judgment into effect.

Having come to the conclusion, that a new trial must be ordered, it would be a waste of time to discuss, and decide the questions whether Judson was improperly admitted as a witness, or whether Cranston was erroneously rejected. It is not apparent, that under the act of April 13th, 1857, the same questions can arise on the re-trial of the action.

A new trial should be ordered, with costs to abide the event.

DUER, CH. J., concurred in holding the following conclusions of fact and of law, and in the views contained in the opinion of BOSWORTH, J., in support of them.

"Whether the assignment was made with intent to hinder, delay, or defraud the creditors of Judson, is a question of fact and not of law.

The Court in its formal statement of the facts which it found the evidence established, has not found as a fact, that the transfer was made with that intent.

The conclusion and judgment, stated in the *judgment* itself, that it was made with such intent, must be deemed to have been, in the mind of the Court, a conclusion of *law* from the facts

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specially found. This is made quite obvious from the *opinion* of the Court at Special Term.

If the material facts, from which, the conclusion of an intent to defraud has been deduced as one of law, have been erroneously found upon the evidence given, there must be a new trial.

Upon the evidence given, our conclusions are, as follows:

1. Cranston agreed to pay for the transfer of Judson's interest more than it was worth, and more than could have been obtained for it from any other person, or by any mode of sale either public or private.

2. That in such purchase and transfer the good will of the business was estimated and included.

3. That Cranston as a consideration for the transfer agreed to pay all the copartnership liabilities, including the sum of \$25,000, which Judson had fraudulently contracted in the firm's name, for his own benefit.

4. That the motive and intent of Cranston in making this purchase were to save himself from being ruined by Judson, and to secure the application of the partnership property to pay the partnership debts, and thus to make an appropriation of it which was just and equitable.

5. That the giving of the mortgage for \$25,000, by Judson, was not made by Cranston a condition of his accepting of the transfer, and signing the service paper, and that he would have accepted of the one and signed the other, whether the mortgage had been executed or not.

6. That the agreement to employ Judson and wife, was no part of the consideration or price paid for the transfer, and was not so understood by the parties at the time, but was an agreement extorted from Cranston by force of the embarrassments and peril in which Judson had placed him; that all he agreed to pay for such services, was an agreement to pay for a thing which did not then exist, and on which no creditors of Judson then had a lien, and was to be paid, for an equivalent to be thereafter received, and to be paid after it had been received.

7. The dissolution was absolute and complete on the 5th of December, 1854, and Cranston would have accepted of the agreement to dissolve, if no other agreement could then have been obtained from Judson.

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8. That the agreement for a dissolution, the agreement to employ Judson and wife, and the transfer of Judson's interest, on the consideration agreed to be paid, of themselves, upon the evidence as it stands, do not warrant the conclusion, that the transfer was made with an intent to defraud.

9. The mortgage was given to indemnify Cranston against liabilities then undiscovered, and which he might be compelled to pay, and which Judson might have fraudulently contracted in the firm's name. There were such strong reasons to apprehend the existence of undiscovered liabilities of that character, that the taking of a mortgage to indemnify and protect himself against them, would be no evidence that Cranston's intent, in taking a mortgage for that purpose, was fraudulent.

10. It was as just and reasonable for Cranston to take a mortgage for such a purpose, as for any other creditor of Judson to take security for his debts against, or his liabilities on account of Judson.

11. A mortgage, for such a purpose, has no connection in fact, nor any necessary connection in intent, with a contract to pay a just consideration to Judson for his interest in the partnership business.

12. As between the parties to it, its real purpose may be shown, and on that purpose being established, the Court would enforce it, so as to make it subserve the purposes for which it was executed.

Whether, as against the creditors of the mortgagor, the falsity of the consideration stated would be evidence, *prima facie* or conclusive, of a fraudulent intent, is a question we deem it unnecessary to determine.

13. Even if the mortgage could not be upheld, as to the property it covers, it does not follow that its invalidity against creditors will necessarily avoid the transfer of the partnership assets. They do not, in terms, relate to the same matter or property. The mortgage does not relate to the partnership property, nor to the liabilities which Cranston agreed to assume and pay, in consideration of a transfer to him of Judson's interest.

The conclusion is not authorized, by any facts correctly found, that the two were part of one transaction, in any such sense, that Cranston would not have taken the transfer, on the terms on

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which he did take it, if Judson had refused to execute the mortgage.

14. As many of the most material facts, as found, are not warranted by the evidence, and as it is not found as a matter of fact, that the transfer was made with an intent to defraud, a new trial must be granted.

15. Cranston being a purchaser for value, it is essential to show, that in making the purchase he knew that the intent of Judson in making the transfer was fraudulent. Whatever Judson's intent may have been, if Cranston did not purchase with knowledge of it, but if, on the contrary, purchased for a fair consideration, to protect his just rights, and those of the partnership creditors, his purchase could not be voided, merely because the intent of Judson was fraudulent.

As a new trial is unavoidable, it is unnecessary now, and may be useless for the purposes of a second trial, to determine whether Judson was erroneously admitted, or Cranston erroneously rejected, as a witness.

SLOSSON, J., dissented.

WILLIAM PURVIS v. ROBERT B. COLEMAN and CHARLES
A. STENSON.

Where, upon a trial, facts have been specially found by the jury in answer to questions submitted by the Judge, and a verdict directed subject to the opinion of the Court at General Term; a motion cannot be entertained at General Term to set aside the finding of the jury, upon one or more of the questions submitted, as against evidence. Such a motion must be made in the first instance at Special Term, and it is only upon an appeal from an order there made, that such a motion can be considered by the Court at General Term.

When no such motion is before the Court at General Term, the finding of the jury upon the questions of fact submitted to them, must be regarded as conclusive, and the duty of the Court, as it is upon a special verdict, is merely to declare the law arising upon the facts as found. Negligence, when the facts upon which the charge depends are disputed, is a mixed question of law and fact. The jury must ascertain the facts, and the Judge must instruct them as to the rule of law which they are to apply to the facts as they shall find them.

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When an agent or servant performs an act which it was for the manifest benefit of his principal or master, should be performed, the assent and authority of such principal or master to the performance of the act will be implied. In an action, by a guest, against an inn-keeper to charge him with the loss of money or valuable articles, it is a good defence, that actual notice had been given to the plaintiff, that a safe had been provided for the purpose mentioned in the act "to regulate the liability of hotel-keepers," although no notice, stating that fact, was posted, at the time, in the room occupied by such guest. The act although not in terms yet by a necessary implication, sanctions the defence.

(Before DUER, Ch. J., & HOFFMAN, J.)

Heard, May 20; decided, May 30, 1857.

THIS action comes before the Court, on a verdict for the plaintiff, subject to the opinion of the Court, at General Term.

This was an action against the defendants as keepers of a common inn, in the city of New York, known as the Astor House, to recover from them the sum of \$1,964 with interest, being the value in dollars, of four hundred sovereigns, which the complaint alleged that the plaintiff had lost while a guest in the Astor House, through the negligence and carelessness of the defendants, or their servants. The complaint also alleged that the plaintiff was a traveller in the United States, and had brought the sovereigns with him for his necessary travelling expenses.

The answer after denying most of the allegations in the complaint, set up as a special defence, that the defendants at the time the plaintiff was received as a guest in their inn, provided and kept in the office of the inn, a safe, for the safe keeping of money, jewels, or ornaments belonging to their guests, and that the plaintiff was duly notified thereof. This defence was founded on an act of the legislature, passed in 1855, entitled an "act to regulate the liability of hotel-keepers." (Sess. Laws, 1855, c. 421.)

The act is in these words,

"The people of the State of New York, represented in Senate and Assembly, do enact as follows:

"SEC. 1. Whenever the proprietor or proprietors of any hotel shall provide a safe in the office of such hotel, or other convenient place for the safe-keeping of any money, jewels, or ornaments, belonging to the guests of such hotel, and shall notify the guests thereof by posting a notice (stating the fact that such safe is provided, in which money, jewels, or ornaments may be deposited), in the room or rooms occupied by such guests, in a

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conspicuous manner, and if such guest shall neglect to deposit such money, jewels, or ornaments, in such safe, the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels, or ornaments, sustained by such guest by theft or otherwise."

The cause was tried before Mr. Justice SLOSSON, and a jury, in December, 1856.

It was clearly proved upon the trial that the plaintiff who is a resident at Sumatra, in the East Indies, and had visited the United States for pleasure, while a guest in the defendants' hotel, had sustained the loss alleged in the complaint. The money was in a trunk which was broken open. The defendants proved that they kept a safe in their office as required by the statute, and it was proved by a servant in their employ, that when he conducted the plaintiff to the room he was to occupy, he told him if he had any money or jewelry, to deposit it in the office, as there was a safe provided for it, and that there was an act passed by the legislature to keep hotel-keepers from any liability for a loss. Upon the question, whether the notice mentioned in the statute, was duly posted in the plaintiff's room, there was a conflict of evidence. A printed notice such as it was alleged had been posted up, was read in evidence on the part of the defendants. It is not necessary to state more particularly the evidence on the trial, since the questions of law that were argued and decided at General Term, arose entirely on the facts specially found by the jury, and on the charge of the Judge.

When the testimony was closed, the counsel for the parties summed up the case upon the following questions, which were directed, by the Court, to be submitted to the jury for their determination:

FIRST.—Was the money in the trunk at the time the trunk was broken open?

SECOND.—Was the printed notice "A," posted up in the bedroom at the time the plaintiff took possession of it?

THIRD.—Was notice given to the plaintiff of the existence of the safe, as a place of deposit for valuables, other than the printed notice?

FOURTH.—If you answer the third question affirmatively, then was the plaintiff guilty of negligence, under the circumstances, in not availing himself of the notice so given to him?

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FIFTH.—Was the money in the trunk (if you find it was there) a reasonable amount to defray the expenses of the plaintiff, taking into consideration the journey he was on, or the travelling he was engaged in, as far as the evidence shows what that was?

His honor, the Judge, then submitted the questions aforesaid to the jury, and charged the jury as follows:

For the purpose of this trial, I charge, that if the information communicated to the plaintiff by the waiter (if you find it was so done), was communicated by the authority of the defendants, and was so communicated as that it was understood by the plaintiff, so that he had actual full notice of the fact, that there was a safe in the office appropriated for the safe custody of valuables, it was negligence, considering the amount of money in his trunk, not to have intrusted it to the safe. He should, at least, have made further inquiry.

To all of which charge the counsel for the plaintiff excepted.

The jury found upon the several questions as follows:—

To the first, third, and fourth questions, in the affirmative. To the second question, in the negative; and to the fifth question, that the amount was not too much.

The jury thereupon, under the direction of the Court, rendered a general verdict for the plaintiff against the defendants, for the sum of two thousand and fifty-eight dollars, subject to the opinion of the Court at General Term.

W. H. Leonard, for the plaintiff, moved for judgment on the verdict in his favor. He insisted that, the provisions of the statute not having been complied with, as the jury had found, the case stood upon the same ground as if no such act had been passed; and the liability of the defendants at common law could not be doubted. He also insisted, that the Judge, upon the trial, erred in submitting to the jury the question, whether the plaintiff had been guilty of negligence. He cited, *Grinnell v. Cook*, 3 Hill. 489; *Piper v. Manny*, 21 Wend. 284; 2 Kent's Com. 598-4.

J. Miller, for the defendants, contended that, whatever might have been the liability of the defendants at common law, they were plainly exonerated by the finding of the jury, that the

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plaintiff had notice that a safe had been provided, and had neglected to avail himself of the knowledge. These facts brought the case, if not within the words, within the equity and spirit of the statute.

BY THE COURT. DUER, C. J.—We are now to determine whether the plaintiff is entitled to judgment upon the verdict, as rendered, or whether it is not our duty, upon the facts specially found, to set aside the verdict, and order a judgment, with costs, for the defendants.—Code, § 262.

It was insisted by the counsel for the plaintiff, that the finding of the jury, upon the question of notice to the plaintiff that a safe had been provided, was against evidence, inasmuch as the testimony of the only witness who swore to the facts was so uncertain and contradictory, that it ought to have been disregarded. But this is plainly a question that we have no right to entertain. If the counsel supposed that the verdict of the jury was, in this respect, against evidence—we are far from meaning to intimate that it was so—he should have moved for a new trial at Special Term. When a verdict has been taken, subject to the opinion of the Court at General Term, the only questions on which the Court can pass, or should permit to be argued, are questions of law arising upon exceptions, or upon undisputed facts; and when the facts upon which the case depends have been specially found by the jury, their finding is conclusive. The finding of a jury upon particular questions submitted by the Court, is a convenient substitute for a special verdict, and the duty of the Court at General Term is, in both cases, exactly the same; it is simply to declare the law arising upon the facts, as found. It is true, where a material question has been submitted, in relation to which no evidence at all had been given, or where a material question, that ought to have been submitted, has been omitted, the Court, in the exercise of its discretion, may grant a new trial; but in all other cases the prevailing party is entitled to a final judgment.

It has been contended that in this case there was no evidence to justify the submission to the jury of the question whether the plaintiff was guilty of negligence in not availing himself of the notice given to him—but we are clearly of opinion that there

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was evidence applicable to the question, and that it was properly submitted to the jury—that the plaintiff did not avail himself of the notice is certain, and if the notice was as full and explicit as it will appear it was found to be, by the jury, the negligence imputed to the plaintiff was a necessary conclusion.

It was also insisted that negligence, as a question of fact, ought not to have been submitted to the jury at all, but as a question of law ought to have been determined by the Court. But when the facts upon which the charge depends are disputed, negligence is what is termed, in many cases,—although improperly,—a mixed question of fact and of law, that is, the jury are to ascertain the facts, and the judge must instruct them as to the rule of law which they are to apply to the facts as they shall find them. And it is exactly this course that was followed in the present case. The judge charged the jury “that if the information communicated to the plaintiff was communicated by the authority of the defendants, and was so communicated as that it was understood by the plaintiff, so that he had full notice that there was a safe in the office appropriated to the safe custody of valuables, it was negligence, considering the amount of money which he had, not to have intrusted it to the safe.” The jury in finding that the plaintiff was guilty of negligence, we are bound to presume found all the facts which the Judge had told them were necessary to be proved to justify the charge, and they drew from those facts the exact conclusion which the Judge had instructed them to draw.

It was, however, insisted by the counsel for the plaintiff that the Judge erred in his charge in submitting to the jury the question whether the communication made by the waiter to the plaintiff was made by authority of the defendants, since there is not a scintilla of evidence in the case to show that any such authority was in fact given. That there was no proof of an express authority is certain, and if such an authority was necessary to be proved, in order to discharge the defendants, the objection of the counsel is unanswerable—but we cannot think that any such proof was necessary. The authority of the waiter sprang from his relation to the defendants. In making the communication in question, he consulted their interests, and sought to protect them against a loss to which they might otherwise have

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been possibly liable. He was therefore acting in the discharge of a duty, which, as a servant, he owed to the defendants as his masters, since he was doing that which it was certain that they, with a knowledge of the facts, would have wished and directed him to do. We apprehend that in all cases where an agent or servant without any prior authority, performs a needful act, which it was for the manifest benefit of his principal or master should be performed, the assent and authority of such principal or master to the performance of the act will be implied, and an opposite doctrine, it seems to us, would be highly unreasonable. In the law of Marine Insurance the doctrine of an implied authority is of frequent application. In many cases an insurance made by an agent having no prior order or direction to insure is held to be valid, and the ground upon which in all these cases a prior authority from the principal is implied is the same, namely, that the act of the agent was so manifestly for his benefit, as to render it certain that had the circumstances been known to him in time, he would himself have effected or directed the insurance.* In the observations that we have made on this question of authority, we are not to be understood as saying that if the information given to the plaintiff had been communicated to him by a person not in the employ of the defendants—another guest for example—it might not have been deemed sufficient to charge him with actual notice.

The only question that remains upon the special finding of the jury, is whether the defendants are to be held liable for the loss that is claimed, upon the sole ground that the notice required by the statute was not at the time of the loss posted up in the bedroom of the plaintiff, although he had actual notice of all the facts, that a notice so posted up would have contained. Unless the affirmative of this proposition is true the plaintiff cannot be entitled to recover; that it is true we find it impossible to believe. We shall admit that the notice given by the waiter to the plaintiff would not have been sufficient to discharge the defendants at common law, notwithstanding the charge of the

* The reader will find this subject discussed and the cases collected in 2 Duer on Insurance, p. 132, III.

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judge and the finding of the jury, upon the question of negligence, but that the notice was rendered sufficient by the act of the legislature, not indeed by its terms, but by its reasonable, and as it seems to us, even necessary construction, we do not at all doubt. The notice which the statute requires is merely constructive, since it is evident that a notice posted up in the room of a guest may wholly escape his attention, yet he is not permitted to aver his ignorance, but is bound by that presumption of his knowledge which the statute raises. When the facts raising the presumption are proved, his recovery is barred. It is true, the statute is silent as to the effect of actual notice, but we cannot believe that the legislature intended that a greater effect should be attributed to the presumed knowledge of a guest than to its actual proof—that while the presumption bars his recovery, the proof must be rejected or disregarded. Such a construction of the intention of the legislature would be most unreasonable, and although that which we believe to have been its true intention is not expressed, we cannot but think that it is necessarily involved in that which is expressed, and the meaning of the statute we hold to be,—that the knowledge of a guest who has failed to deposit his money, or jewelry, in a safe, that he knew to have been provided, shall defeat his claim for a subsequent loss, and that such is its consequence, whether the knowledge be established by direct and positive, or merely presumptive evidence. Nor do we suppose that such a construction is confined to the statute under consideration. The rule, we think, may be stated as universal, that when a statute declares that certain acts shall create a presumption of knowledge, which the party to be affected by the knowledge is not permitted to repel, it declares by a necessary implication, that the party's actual knowledge of the facts to which the presumption relates, is just as admissible in proof, and when proved is equally conclusive. Of the application of the rule, the actual knowledge of a subsequent purchaser of an unrecorded deed or mortgage is an example. If it be said that such a purchaser is not a purchaser in good faith, the reply is that there is a similar want of good faith in a guest who, with a full knowledge that a safe had been provided for the purpose for which it was provided, seeks to deprive an inn-keeper of the protection that the legislature meant to afford him upon the sole

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ground, that the terms of the statute had not been literally complied with. The notice given to the plaintiff in this case, the jury have in effect found, contained all the information that a notice posted up in his room, if read, would have conveyed to him, and we are clearly of opinion, that in disregarding such a notice, the plaintiff acted at his peril, and took himself the risk of any subsequent loss.

The verdict must, therefore, be set aside, and a judgment with costs be entered for the defendants.

CARLOS A. BUTLER, Plaintiff and Respondent, v. MORRIS,
impleaded, Appellant.

When two persons are made defendants, and sued as joint makers of a promissory note, and they answer separately, and one of them pleads infancy as his sole defence, they thenceforth cease to be "united in interest," within the meaning of those words as used in § 306 of the Code. In such a case, the Judge at the trial, on the fact of infancy being proved, may, in his discretion, permit the plaintiff to discontinue the action, as against such infant, without costs.

Held, that such permission was properly given in this action. The judgment and order appealed from affirmed with costs.

(Before DURE and WOODRUFF, J.J.)

Heard, April 15; decided, May 30, 1857.

THIS action comes before the Court at General Term, on an appeal by the defendant Morris, from the judgment, which is in favor of the plaintiff against Ackerman alone, and orders a discontinuance by the plaintiff as against Morris, without costs.

The action is against the defendants, Sylvanus Morris and John Ackerman, as joint makers of two promissory notes. The defendants put in separate defences by separate answers. The defence of Morris was infancy at the time of the making of the notes. The plaintiff went to trial against both defendants. The action was tried in March, 1857, before Chief-Justice OAKLEY and a jury.

On the trial, the plaintiff having proved and read the notes in evidence, the defendant Morris proved, by his father, that he

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was an infant at the time the notes were made. Thereupon, the plaintiff moved for leave to discontinue the action as to the defendant Morris, without costs. The Chief-Justice granted the motion, against objection by Morris's counsel, who excepted to the decision, and from the judgment in favor of the plaintiff against the other defendant, and ordering a discontinuance as to Morris, without costs, the latter appealed to the General Term.

Wm. H. Taggard, for appellant—cited (*inter alia*) 13 Barb. 187; 2 Cow. 508; 5 J. R. 160.

Q. McAdam, for respondent—cited 1 Cow. 417; 13 Barb. 540.

BY THE COURT. WOODBUFF, J.—Before the Revised Statutes, permitting a plaintiff to discontinue, without costs, where one of two defendants, sued upon a joint contract, interposed a plea of infancy, discharge as an insolvent, &c., appears to have been regarded as resting in "sound legal discretion."

When a sole defendant obtained an insolvent's discharge pending the action, the plaintiff was permitted to discontinue without costs. (*Hart v. Story*, 1 Johns. R. 142; *The Pres't, &c., of the Merchants' Bank v. Moore*, 2 J. R. 294.)

But in such case it was held, that if the plaintiff, knowing of the defendant's discharge, will nevertheless go on with the suit, he must, if he afterwards discontinue, pay costs, that is to say, all the costs to which the defendant was subjected after such discharge. (*Ludlow v. Hackett*, 18 J. R. 252; *Merritt v. Arden*, 1 Wend. 91.)

In *Ex parte Nelson*, 1 Cow. 417, the Court of Common Pleas, in an action of assumpsit against two defendants upon a joint note, allowed the plaintiff, on the trial, to enter a *nolle prosequi* without costs, as to one defendant who had pleaded and proved his infancy. The Supreme Court refused a *mandamus* to compel the Common Pleas to allow costs to such defendant, on the ground that it was so far a matter of discretion that a *mandamus* would not lie, even if the order was improper; the writ of *mandamus* being appropriate only where the party has a strictly legal right, and no other legal remedy. Whether a writ of error would lie in such case, they do not distinctly decide, but they pretty clearly

intimate that the discretion of the Court below was properly exercised.

The Revised Statutes committed the subject fully to the judgment of the Judge before whom the trial should be had, in all actions upon contract where there was more than one defendant by providing, that if the plaintiff fail to recover against one, or judgment be rendered in favor of one on plea in abatement, or on demurrer, or by the plaintiff's discontinuance, such defendant shall not be entitled to costs, unless a certificate be given by the Court before whom the trial shall be had, &c., &c., * * that such defendant was unnecessarily and unreasonably made a party to such action. 2 Rev. St. [616] Pt. 3, ch. 10, tit. 1, § [20.]

Had the present question arisen under the Revised Statutes, it would have been entirely clear, therefore, that the defendant, Morris, is not entitled to costs; no such certificate was, nor under the views governing the Judge at the trial could have been had.

So that if we could adopt the view urged upon us by the counsel (in citing other sections of the same chapter), that the provisions of the Revised Statutes relating to this subject are still in force, we must hold that the appellant is not entitled to costs.

We are, however, of opinion that the Code has superseded that chapter of the Revised Statutes, and that the correctness of the judgment and order appealed from must be decided according to the true construction of the provisions of the Code.

Prior to the amendments of 1851, it was repeatedly held, that in actions against two or more defendants, if the action was what would have been deemed an action at law, if the plaintiff failed to recover judgment against all of the defendants, those against whom he did not recover were entitled to costs as a legal right—and that the discretion given by § 806, applied to equity suits only.

But in 1851, by the words "in all actions," the Legislature have given to the section a more comprehensive meaning than it was before supposed to import.

Now, "in all actions where there are several defendants not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the Court may award costs to such of the defendants as have judgment in their favor or any of them."

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If, under this section, the allowance of costs lay in the discretion of the Court, we do not hesitate to say that we should not interfere therewith. If the facts appearing on the trial were, as seemed to be conceded on the argument of the appeal, the language of SAVAGE, CH. J., in *Ex parte Nelson*, seems singularly apt to the present case; "the defendant asks for costs with a very ill grace when he has first palmed himself upon the plaintiff as an adult, and thus obtained his property, and then pleads infancy in his discharge."

The case before us is an action in which there are several defendants, making separate defences by separate answers, and the plaintiff has failed to recover judgment against all. It only remains, then, to consider whether these defendants were "united in interest," within the meaning of § 806.

If they were not, then it was not erroneous in the Judge to deny costs to the appellant. If they were united in interest, then the terms of the previous sections, 804 and 805, give costs to the appellant, as matter of right, and we must reverse the judgment in this respect.

Prima facie, the defendants were jointly interested in defeating a recovery. The liability upon the notes was in form joint, and *prima facie*, a judgment thereupon would bind both defendants, and their joint property, if any, and the several property of each; and if either paid the judgment, the other would be bound to contribute his share in reimbursement. So that there was upon the face of the notes an apparent and complete union of interest in the two defendants.

But I apprehend that this is not conclusive; if, in truth, the two defendants were not united in interest under the issues made between the parties, there is room to satisfy the terms of the section, and preserve to the Court a highly just and equitable discretion to relieve the plaintiff from paying costs.

According to the decisions before the Code, the plaintiff was bound by law to make Morris a defendant, (even though he knew all the facts,) and yet against him upon the answer which he put in, the plaintiff could by no possibility recover.—*Van Bramer v. Cooper et al.*, 2 J. R. 279. *Hartness v. Thompson et al.*, 5 J. R. 160. *Mason v. Denison et al.*, 15 Wend. 64.

Whether the plaintiff was, under the Code, bound to make the

infant a party defendant, though he knew him to be an infant, it is not necessary for us to decide. The decision in *Stosum v. Hooker*, 18 Barb. 586, is, that the rule is the same now as it was before the Code was enacted.

The moment the defendants severed in their defence, and the appellant rested upon his plea of personal exemption from liability, the interest of the defendants not only ceased to be even *prima facie* united, but became clearly adverse to each other. If he succeeded in establishing his infancy, the whole liability was cast upon his co-defendant, who must pay the whole without a right to require contribution from the appellant. And on the other hand, (his infancy being, so far as appears by the case, his sole defence) if he failed to establish his infancy, judgment must go against him, and it may be (as the defence of the other defendant is not before us,) whether the co-defendant established his defence or not.

The appellant proved the infancy he had alleged, and then, not merely according to the state of the pleadings, but according to facts established, the defendants were not united in interest, and therefore, when the order was made, it appeared that the parties, according to the very truth of the matter, were not united in interest when the action was commenced.

In this action, then, upon the issues made by the parties, as the same came before the Court for trial, and upon the facts established by the evidence, the interest of the two defendants was diverse and antagonistic. I think that this may properly be held, to satisfy the words "not united in interest," in the section under consideration. This construction is far the most reasonable, and better enables the Court to do justice. I am quite unwilling to believe that the Legislature intended to deprive the Court of the power to permit a discontinuance without costs, where an insolvent's discharge was obtained, pending an action; or where an infant concealing his infancy, makes a contract whereby he obtains the money or property of another who learns, for the first time, after action brought, that he has dealt with one who has not legal capacity to make a binding contract. And yet, if this power is not derivable from section 806, I do not find that the Court could permit such a discontinuance, though proposed at the earliest moment the facts were discovered,

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(By this, I of course do not mean that if the defendant came to ask leave to interpose such a plea after having once answered, a condition might not be imposed involving such a privilege.)

The construction of the section, (306,) which I have above given, is intimated in *Slocum v. Hooker*, in the opinion of Justice Parker, 18 Barb. 541, who says on this subject, in reference to the discretion given by the Revised Statutes, that under § 306, there is room for the same exercise of discretion.

It was urged on the argument that the plaintiff should have discontinued so soon as he received the answer, and should not have put the defendant to the necessity of proving its truth. There may often be cases in which the plaintiff is perfectly aware of the infancy of one of the defendants, and makes him a party only because the contract being joint, and as to the infant voidable only, he cannot know whether he will set up such a defence; and in such cases the Court might feel it just to give costs to the infant, if knowing the truth of the answer, the plaintiff put the defendant to the expense of proving it. But I cannot sanction a precedent which would require a plaintiff, in all cases, to take the word of the infant, and abandon the prosecution, because the defendant says that he is such infant, and therefore not bound by his contract. The plaintiff may, frequently, have convincing reasons for believing that the answer is untrue—these may sometimes be representations of the defendant himself when making the contract—or his long continued holding himself out as an adult, carrying on business as such, and with a personal appearance warranting the plaintiff's belief.

Such circumstances may properly be considered by the Court, when leave to discontinue is applied for, and doubtless such circumstances were properly considered in the present case.

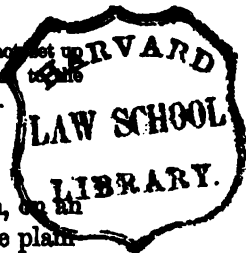
I think the judgment and order should be affirmed.

Ordered accordingly.

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CHARLES S. DE ZENG et al., Respondents, v. JOHN FYFE,
Appellant.

The maker of a promissory note for the accommodation of the payee, cannot set up as a defence, in cases exempt from fraud, that the note was transferred to the plaintiff, in satisfaction of or as collateral security for a pre-existing debt.
(Before DURE, SLOSSON, and WOODRUFF, J.J.)
Heard, April 18; decided, May 30, 1857.



THIS action comes before the Court at General Term, on an appeal by the defendant from a judgment in favor of the plaintiff, entered on the verdict of a jury.

This action was brought to recover the amount of two promissory notes made by the defendant, payable to the order of Stebbins, Garabrant & Co., and endorsed by the payees to the plaintiffs. It was tried before Mr. JUSTICE SLOSSON and a jury, in February, 1857.

The defendant proved on the trial that the notes were made without any consideration for the "general accommodation of the payees, to be used by them in their business without any restriction as to their use."

The defendant then offered to prove "that the payees of the note (Stebbins, Garabrant & Co.) were owing to the plaintiffs a debt of \$1000, for which they had given a check which had been dishonored, and that the plaintiffs called upon the payees for payment of such check, and they turned out to the plaintiffs the notes of the defendant now in question. That the plaintiffs did not surrender the check, but have repeatedly asked for payment since. That at the time the check was made, and also when the notes were made, Stebbins, Garabrant & Co. were insolvent, and have continued so ever since, and that the plaintiffs have given no other consideration for the notes."

Upon an avowal by the defendant that this was all he proposed to prove, and upon objection by the plaintiffs that this proof would constitute no defence, the judge rejected the evidence, and the defendant's counsel excepted. A verdict for the plaintiffs

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was then rendered, and from the judgment entered thereon the defendant appealed to the General Term.

Wm. M. Allen, for appellant.

Geo. F. Chester, for respondents.

BY THE COURT. *WOODBUFF, J.*—The only point to which our attention was called, on the argument of this appeal, is the rejection of the evidence offered by the defendant. His counsel insists that the evidence should have been received. While, on the other hand, the plaintiffs insist, that had testimony been given, establishing the facts stated in the offer, no defence would have been made out, and no question would have been raised thereby, which it was proper to submit to the jury.

The facts proved, and the facts which the defendant offered to prove, raise this single question :

When a note is made by a defendant for the accommodation of a payee, and he delivers it to the payee for his use, without any qualification or restriction, and such payee passes it to the plaintiff as security for a pre-existing debt, can the plaintiff recover thereon against the maker?

It seems to us that there can be no doubt upon this subject. Indeed, we are somewhat at a loss to discover grounds upon which the maker in such case should hesitate to pay the note, or deem himself in any degree excused, if he refuse.

He lent his notes for the very purpose of enabling the payees to use his credit in any manner which the exigencies of their business required or made convenient to them. The notes were used accordingly. The payees had full authority to use them, and we know of no reason or principle upon which the notes might not as well be given out as security for a debt, as discounted to raise money to pay the debt. The result in each case is precisely the same to the maker. The notes serve a useful purpose to the payees, and, for aught that appears, a purpose within the intent for which they were made by the makers.

The cases to which we were referred by the counsel for the defendant, do not sustain the defence. They are instances of the fraudulent misappropriation of a note, or where there was

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some fraud in procuring it, or where there existed some circumstance in the relation of the parties which would make its collection operate as a fraud upon the maker. (20 J. R. 637; 10 Wend. 85; 12 Ib. 598; 13 Ib. 605.) The case, which has become somewhat prominent in the history of this subject, *Stalker v. McDonald* (6 Hill. 93), was a case in which the transfer was a plain fraud upon the plaintiff, the owner of the note, for the recovery of which the suit was brought, and although in that as also in some of the other cases, *dicta* may be found general in their form and sufficiently broad to warrant the claim here made by the defendant, the cases themselves do not warrant any such defence. The case of *Skidding et al. v. Warren* (15 J. R. 270), in some of its particulars, resembles the present. That was an action upon an accommodation note, but it was fraudulently transferred, and the plaintiffs received it with knowledge of the fraud.

On the other hand, the very point was distinctly decided against the defendant in *Grandin v. Le Roy* (2 Paige, 509), where the Chancellor held, that where the endorsers of an accommodation note lent their names to the maker, without any restriction as to the manner in which the note should be used, he had a right to use it to pay or secure an antecedent debt.

In *The Bank of Rutland v. Buck* (5 Wend. 66), it was held, that a surety to a note for the accommodation of the principal, is liable upon it when passed away as collateral security for the payment of a judgment. (See also 4 Cow. 567; *White v. Springfield Bank*, 3 Sandf. S. C. R. 222.)

The decision of this Court in *Lathrop v. Morris*, in 5 Sandf. 7, is wholly inconsistent with the views insisted upon by the defendant's counsel. The principle of that case is, that one who receives a note, either in payment or as collateral security for a pre-existing debt, is entitled to recover against an accommodation maker, in cases exempt from fraud; and this principle is there treated as fully settled.

It is hardly necessary to add, that the judgment must be affirmed.

Possibly some question might have been raised, whether, upon the facts testified by the payee, the plaintiff was entitled

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to recover for a greater sum than the debt for which the note was held as security. But no such question was raised on the trial, nor was it suggested on the argument of the appeal.

Judgment affirmed.

EVELINE PEACOCK, Executrix of JOHN C. RYAN, deceased,
and DAVID C. PEACOCK, Respondents, v. THE NEW YORK
LIFE INSURANCE Co., Appellants, &c.

When a life policy of insurance is renewed, the policy itself, the representations made by the assured when the policy was effected, and the certificate of renewal are to be construed together, and to receive, if possible, a consistent interpretation.

As the design and object of the parties is to renew a pre-existing contract, the terms employed will not be deemed inconsistent with the conditions of the policy, if they reasonably may be construed in harmony with them.

Hence, when the policy is renewed, upon the condition that the assured is then in "good health," the words, "good health," in the certificate of renewal, will be construed in the same sense as the same words in the representations made by the assured, when the policy was effected, and which were declared to be "the basis of the contract."

If, therefore, the health of the assured, when the policy was renewed, was substantially the same as when it was effected, and he was then subject to no other complaints than those he had before specified, the insurers, in the event of his death, will not be excused from the payment of the sum insured, upon the ground that his health, when the insurance was renewed, was not positively and absolutely good.

When the preliminary proofs, furnished in good faith, to an Insurance Company, are defective, the Company is bound, in common fairness, to suggest the defect, and not hold it in reserve, in order to delay the payment of a loss, or compel a new suit for its recovery.

(Before DUEK, SLOSSON, and WOODRUFF, J.J.)

Heard, April 16; decided, June 13, 1857.

THIS action comes before the Court, at General Term, on a motion, by the defendants, for a new trial, on questions of law, arising upon exceptions taken at the trial, and there ordered to be heard in the first instance at the General Term, and the entry of judgment to be, in the mean time, suspended; (the plaintiff having recovered a verdict for \$5 865 28). The action was

brought to recover the sum of \$5,000 (with interest), insured by the defendants upon the life of John C. Ryan, deceased.

The policy is dated the 8th day of March, 1853; premium \$160 per annum, payable in advance on the 28th day of February in each year.

The policy was conditioned, among other things, that if the premium was not paid as prescribed, the defendants were not to be bound by the policy. The assured, before obtaining the policy, made certain declarations in regard to his habits and health. The assured did not pay the premium, which fell due the 28th of February, 1854, when due. The defendants accepted the premium on the 7th of March, 1854, and renewed the policy upon this condition, "that he (the insured) is now in good health; proof of which, in case of death, to be furnished the Company." The assured died 22d May, 1854. May 29th, the defendants were served with affidavits of Caleb Barstow and Henry E. Blossom, stating the death of the assured, and the disease to which they attributed his death.

The declarations made by the assured when the policy was effected, are stated in the points of the defendants' counsel, and in the opinion of the Court. When the policy was renewed, the assured stated, in a letter to the President of the defendants' Company, "that, as to his health, he was better off than when he got the policy."

The defence was, that the defendant was not in good health when the policy was renewed, and that no preliminary proofs had been furnished.

The issues raised by the pleadings were tried before Mr. JUSTICE BOSWORTH and a jury, in January, 1857.

A number of witnesses were examined to show the actual state of the health of the assured, when the policy was renewed, and it was proved that the renewal was on the condition that he was then "in good health."

When both parties rested, the defendants moved for a dismissal of the complaint, on the ground that the plaintiff was obliged to produce to the defendants preliminary proof of the health of the assured, at or before the time of claim made for the amount insured by the policy, and that it did not appear that such proof had been furnished.

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The Judge denied the motion, and the counsel for the defendants excepted.

His Honor, the Judge, then charged the jury, and among other things charged:

That the policy on which the suit was brought had a condition by which it was forfeited if the premium was not paid on the 28th February; that the premium was not paid on that day; that the Company had a right to insist on the forfeiture, or to accept the premium and waive it, and that on such conditions as they saw fit.

That they did in fact receive it, and on the terms expressed in the receipt of March 7th; on the condition that John C. Ryan was in good health, &c. That the only question was, whether he was in good health when the parties finally agreed, the one to leave, and the other to retain the premium.

That in determining what was good health, in the understanding of the parties to the contract, they must take into view the declaration on which the policy was made. That declaration showed his condition as to health, and that was adopted as the basis of the contract; so that the question was, whether, at the time of the premium being paid and retained in March, the said Ryan was in good health, within the meaning of those words, as used by the parties to this contract.

If you shall find, that on the seventh of March, he was not affected with any diseases, other than those mentioned in the declaration on which the policy was issued, which, in the judgment of those conversant with such subjects, would tend to shorten human life, or increase the risk, and that those diseases had not become aggravated so as to make his condition substantially different from what it was when the policy was effected, then he was in good health, within the meaning of those words, as used by the parties, and the plaintiff was entitled to recover.

If you shall find otherwise, your verdict must be for the defendants.

The defendants' counsel, before the jury retired from the Court, excepted to the judge's charge in the following particulars:

1st. To the part in which the judge charged that in deciding what the parties understood by good health, the jury would bear in mind the representations which were made by John C. Ryan, at the time of making the application for the policy.

2d. To the part in which the judge charged, that if on the 7th of March, 1854, John C. Ryan was not affected with any other diseases than those mentioned in his application, which in the judgment of those conversant with such diseases, tended to shorten human life or increase the risk; and if those diseases mentioned in the application of Ryan were not on the 7th day of March, 1854, so aggravated as to make his condition substantially different from what it was when the policy was effected, the plaintiffs were entitled to recover.

The jury retired under the charge of an officer, and returned into Court and rendered their verdict in favor of the plaintiffs, and against the defendants, for the sum of five thousand eight hundred and sixty-five dollars and twenty-eight cents.

J. Miller, for the defendants, in moving for a new trial, made and argued the following points:

I. No proof, before action brought, of the state of health of the insured on the 7th day of March, 1854, (at which time the policy was renewed) was made or furnished to the defendants, in compliance with the condition of the renewal. The motion to dismiss the complaint on that ground should have been granted, and the exception to the ruling of the Judge in that respect was well taken.

It was not the case of a defect of preliminary proof, which the defendants should have pointed out, but a failure of the production of any proof whatever, and it does not appear that the defendants did any act which amounted to a waiver of such proof.

II. The charge of the Judge in the particulars excepted to was erroneous.

Good health, as used in the condition of the renewal of the 7th of March, 1854, is to be taken positively in the common acceptance of the terms, and not by comparison with the health of the insured at any previous period.

Suppose the insured in his declaration had answered he was in

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bad health, and the defendants had made the policy notwithstanding, but on the renewal had required as a condition of such renewal, that he was then in good health, could it be maintained that the good health named in the condition of renewal meant bad health, because the defendants had made a policy originally, notwithstanding the insured was in bad health?

There is no legal presumption that the defendants would not have originally made the policy in question, unless the insured had been in good health.

No proof or presumption is given, or arises, of any agreement or understanding between the parties defining the meaning of the terms good health, inconsistent with the general meaning of those terms.

The only legal inference is, that the defendants were at the time of making the policy willing, notwithstanding the various ailments disclosed in the declaration, to make it.

But that fact is not evidence of their willingness to renew the policy after forfeiture, on the existence of the same state of facts in regard to health.

If the defendants had so intended, instead of the condition that the party is now in good health, the condition would have been that the party is now in as good health, as he was at the time of issuing the policy.

The insured might, or might not, at the time of the renewal, have been cured of the ailments with which he was afflicted at the time of making the policy; of this he was to judge.

If by reason of those ailments he was not in good health at the time of making the policy, he might, perhaps, notwithstanding have recovered, if he had kept all the other conditions.

But having forfeited the policy by non-payment of the premium, the defendants had the right to say, as they did, although we originally insured your life, when you were afflicted with ailments that impaired your health, we now require as a condition of renewal that you are in good health; you may, or not, accept our terms. The insured, by paying the premium and accepting the renewal, agreed to the new terms and conditions, and his legal representatives are bound by them.

The parties themselves, at the time of the transaction, put a

construction upon the terms, good health. The insured in his letter said he would not receive the renewal with the condition annexed, and the defendants thereupon offered to return the premium, if the insured was not willing to take a renewal of the policy upon the condition.

If the insured understood it to mean such health as he was in at the time of issuing the policy, he would not have remonstrated, for he says in express terms, "I am now better off than at the time I got your policy." The insured, therefore, must have understood the terms "good health," as used in the condition of the renewal, to be a positive thing, which the defendants required to exist, and not by comparison, as good, or a better state of health than when the policy was issued, and with that understanding he accepted and retained the renewal. The verdict should be set aside and a new trial granted.

D. Lord, for the plaintiffs, made and argued the following points:

I. By the declaration of health on which the policy was effected, the parties made a standard of good health, as to the party to be insured.

Perfect physical condition is not, in Life Insurance, the standard of good health. (*Ross v. Bradshaw*, 1 Bl. R. 312; *Willis v. Poole*, 2 Marshall on Ins. 770; see cases, 2 Park on Ins. 982, and *Watson v. Mainwaring*, 4 Taunt. R. 768.)

II. The inquiries made and answered related to causes supposed to be permanent and to bear on the goodness of health, from the susceptibility they are supposed to leave in the subject.

III. The answers in the declaration of health, show the following facts, as to the health of the insured, adopted as insurable good health in this case, namely:

Q. 6. That he had not been always sober and temperate; that he had lived freely some years since, but not so now; thinks himself sober and temperate.

Q. 9. As to serious illness:—That he had had dyspepsia and piles, and one summer, bilious fever.

Q. 10. That he was subject or predisposed to bleeding piles occasionally, &c.

Q. 11. That he had had palpitations and nervousness, but not for many months.

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Q. 12. That he was subject to temporary colds, but was about as well as he ever was.

It also appears that the insured had a personal interview with the defendants about the 16th March, 1854, in which the plaintiff spoke of being ill and irritable.

IV. Under these facts, the declaration as to good health, both at the time of the insurance and of the renewal, must be deemed satisfied as between these parties, by a state of health subject to the drawbacks stated in the declaration of health; otherwise, the defendants were receiving a premium for which they undertook no risk.

V. The charge of the Judge left the question of good health to the jury, under no other qualifications than were contained in the declaration of health.

Compare the charge with the declaration of health.

VI. The objection on the trial, as to want of proof of health, as preliminary proof was rightly disregarded.

1. The requirement of preliminary proof in the policy is only of death, not of the state of health.

2. The receipt given by the boy who took the check, never appears to have been known to the insured, or his representatives.

3. And, the personal presence, at the office, of the insured was a sufficient exhibit of the subject as to health, under the declaration.

4. And chiefly, the defendants never called for such certificate, and so waived it, even if it had been strictly preliminary proof required in the policy. (*Bumstead v. The Dividend M. Ins. Co.*, 2 Kernan, 81.)

5. The Court, even if they could imply a condition in the contract, that such a certificate should be produced, would not imply that it must in all cases be made without a demand or call for it: there is no evidence of any such demand.

Judgment for the plaintiffs, on the verdict, should be ordered.

BY THE COURT. WOODRUFF, J.—The policy of insurance—the representations which are declared to be the basis of the contract of insurance, and the certificate of renewal must be construed together. This is only in accordance with the necessary

intent of the parties. The very term renewal, or "renewed," imports the continued existence of the previous contract, and necessarily refers to its provisions. If there is nothing expressed in the terms of renewal inconsistent with the pre-existing agreement, or the conditions in reference to which it is made, then clearly the act of renewal brings again into full legal effect all the terms of the previous policy, subject to the conditions upon which it was made, and to those conditions only.

To this may be added, that the design and object being to renew a pre-existing policy, the terms employed to effect that object will not be deemed inconsistent with the conditions of such policy, if they may reasonably be construed in harmony with those conditions. The nature of the transaction indicates an intent to continue the former contract without modification, unless the terms of renewal show a different purpose.

And, again, it is a reasonable presumption that the same terms employed by the parties in the original contract are used in precisely the same sense, when they appear in a certificate of the renewal of that contract.

If these observations are well founded, they are pertinent to the appeal under consideration, and would seem decisive in their application to the case. And they are especially appropriate in a case in which the whole object of the so called renewal was to waive a default in not paying the premium on the precise day it became due, a default arising from inadvertence.

The original policy was made upon an express condition, that if the declaration of the assured made on his application for insurance, should be found in any respect untrue, such policy should be null and void.

The declaration so referred to contained the representations of the assured respecting his health, and after referring to past habits of indulgence, states that he had had no sickness other than dyspepsia, and piles, &c. That he has bleeding piles occasionally; that he has had palpitations and nervousness, but not for many months; and in answer to a specific question, "is the said party now in good health?" answers, about as well as I ever was, except temporary cold; and it then concludes, that "I am now in good health, and do ordinarily enjoy good health;" and it is then agreed that this declaration and the accompanying pro-

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posal "shall be the basis of the contract" between the assured and the defendants.

The certificate of renewal, which was the only evidence of the renewed undertaking which the defendants furnished to the assured, after acknowledging the receipt of the premium for the second year, contained the words, "renewed on a health certificate."

If no further explanation had been sought or given, it would be difficult to say, that this language imported anything more than that the company had received a certificate, in regard to the health of the assured, which was such that they had consented to renew the policy, and did renew the policy, and waive the default in not paying the premium on the day it became due.

But the matter did not rest there. The assured, conscious, no doubt, that no actual certificate had been furnished other than his original declaration above referred to, sought an explanation, giving the cause of the default (imputing it to the neglect of the defendants' agent), stating that he would give no further explanation as to his health, other than to say that he thought he was better off than when he received the policy. The explanation of the defendants, therefore, is in substantially the terms which formed part of the original declaration which was made "the basis of the contract," viz. that the condition of renewal was that the party insured is in "good health."

Assuming that by this explanation, or by the terms of the memorandum subscribed by the person who carried the check for the premium to the defendants, that good health thus became a condition of the renewal, we cannot find any ground for saying that it had any other or different meaning in the renewal than it had when made the very "basis of the original contract." These words in the contract of renewal were used in reference to the same subject between the same parties, in view of the continuance of the same contract, which was to have the same legal effect and operation in the future. There appears no reason why the parties should have used or understood them in any different sense at the one time rather than at the other.

We cannot say that "good health" has so definite a meaning that it admits of application to only one physical condition. Its ordinary use in the community does not probably import a perfect physical condition once in one hundred times. And when

we place ourselves in the precise condition in which the parties themselves were when the renewal was made, with the previous declaration before us, in which good health, as agreed to in the original policy, meant just such health as the original declaration of the assured described, (in very terms "now in good health,") we cannot hesitate to say that "now in good health," when made a condition of the renewal of the same policy, meant precisely the same thing.

The finding of the jury, then, that the assured was, when the policy was so renewed, in respect of health or disease, in a condition not substantially different from what it was when the policy was effected, seems to us fully to satisfy the condition of the renewal. And these views necessarily dispose of the objection to evidence on that subject, and the exception to the charge of the Judge on the trial.

The remaining exception rests upon the alleged insufficiency of the preliminary proofs in this particular; that, before suit brought, the plaintiffs did not lay before the defendants proof that, at the time of such renewal, the assured was in good health, &c.

Although there is room for doubt whether the memorandum signed by Wm. W. Wilson, the person who took to the company the check for the premium, had any operation upon the plaintiffs' rights whatever, (it not appearing that he had any authority to do anything more than deliver the check,) still we do not think it necessary to rest our decision of this exception upon that ground. The fact nevertheless exists, that the defendants did not insert any condition, (that any such preliminary proof should be furnished), in the receipt they gave to the assured as his voucher for the contract into which the company then entered, and when the president in writing explained the alleged conditions of renewal, he does not intimate that the furnishing of any such preliminary proof is required. And there is nothing whatever to show that the assured, or his representatives, were ever informed of the contents, or even the existence of any such memorandum as that signed by Wilson. The assured had himself been at the defendants' office, and the state of his health had been the subject of conversation.

Under such circumstances we greatly doubt whether the com-

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pany had any right to require such preliminary proof. But if they had, we are quite clear, that when the preliminary proofs were furnished, if they were deemed defective in that particular, the attention of the plaintiffs should have been called to it, or the defect must be deemed waived; and this we should hold, even if the preliminary proofs which were furnished were altogether silent upon the subject. On this subject, fair dealing requires reasonable frankness and candor from the insurance company, and so much the law does and ought to require. The defendants are allowed sixty days after the preliminary proofs are furnished, before they can be required to pay. When, therefore, what are in good faith presented to them as preliminary proofs, are in any respect defective, common fairness requires that such defect be suggested, and that it be not held in reserve, to be used afterwards to obtain further delay of payment, or to defeat a suit brought for the money.

But when these preliminary proofs (*viz.* the affidavit of Messrs. Barstow and Blossom) are read in connection with the fact that the death was only about two months after the renewal, and that the affidavit distinctly refers to the same diseases (as the cause of his death) which are mentioned in the original declaration; (the basis of the policy), and states that he had not been considered dangerously sick more than a week: it is not too much to say, that here is a plain implication that might well be deemed by the company to satisfy their requirement.

Having themselves seen the assured after the renewal was made, in their office, and conversed with him on the subject, and being now furnished with the affidavit of two persons, that though his disease was of the character from which he suffered even when the policy was originally effected, yet he had not been considered dangerously ill more than a week, they had no occasion to require any other or further evidence, that at the time of the renewal, two months before, he was in the good health contemplated by the policy and its conditions. Although the affidavit is not specific to the point, there was enough in it to invite the attention of the company thereto; and if they were not satisfied, they should have suggested the objection.

Judgment must be entered for the plaintiffs upon the verdict.

JOSEPH LOVELL and JAMES COLLES, Jr., Respondents, v. JOHN
ORSER, Sheriff, &c., Appellant.

In an action against a Sheriff, for the escape of a party, in his custody under an execution against the body, it is not a defence, that the attorney of the plaintiff consented that such party might go to another place, out of the bailiwick of said Sheriff, in order to attempt to raise money, with which to pay the judgment on which the said execution was issued.

(Before DUER, Ch. J., and HOFFMAN, J.)

Heard, May 21; decided, June 13, 1857.

THIS action comes before the Court at General Term, on an appeal, by the defendant, from a judgment rendered against him at Special Term.

It is an action for an escape. On the seventh of June, 1853, the plaintiffs in this action commenced a suit in this Court against Hubbard and Barton, and obtained an order for their arrest, directed to the defendant, as sheriff, and, as appears by the defendant's official certificate, they were, on the same day, arrested. Judgment in favor of the plaintiffs in that action was perfected, July 5, 1853, and an execution against property was issued thereon, and returned *nulla bona*. Thereupon an execution against the body was issued on said judgment, to, and was served by the defendant as sheriff, and Hubbard and Barton were arrested thereon, and gave bail for the limits. In May, 1854, Hubbard escaped, and this action was brought. It was tried without a jury, before Mr. JUSTICE WOODRUFF, in October, 1856, who gave judgment for the plaintiffs. On the trial the defendant offered to show that, in a conversation between Mr. Hubbard and the attorney of the plaintiffs in the action in which Hubbard was in custody, the attorney verbally consented that Mr. Hubbard might go to Philadelphia; and that in pursuance of that consent Mr. Hubbard went to Philadelphia, and that the declared purpose of the giving of that consent, and of said Hubbard in going, was to get money wherewith to pay the judgment, the record of which had been produced in evidence, and that for this alleged escape this action was brought.

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The counsel for the plaintiffs objected to this evidence on the ground that the attorney had no power to so consent, unless the defendant would go further and show that this consent was given with the knowledge or concurrence, or received the approbation of the plaintiffs in the judgment or of one of them.

The counsel for the defendant having stated that he did not propose to give such proof in connection with the offer, but insisted upon the testimony being admissible, as offered by him, the Court sustained the plaintiffs' objection and refused to permit the evidence to be given; and the defendant duly excepted to the decision.

The finding of the judge, before whom the action was tried, is as follows:

"FIRST.—That the plaintiffs did recover the judgment set forth in the plaintiffs' complaint.

SECOND.—And that the defendant, on or about the 27th day of May, 1854, suffered or allowed the said Thomas S. Hubbard to escape from his custody, or go out of his bailiwick, or county, as alleged in the complaint."

To which last finding, the defendant, by his counsel, excepted, and the exception was duly noted.

"THIRD.—That this action was commenced against the defendant, while the said Hubbard was out of the defendant's bailiwick."

To which last finding the defendant, by his counsel, excepted, and the exception was duly noted.

And the said Justice then and there was of opinion, and decided as his conclusion of law, from the facts so found by him, that the defendant was liable to the plaintiffs for the amount of the said judgment so recovered against the said Hubbard and Barton, with interest thereon from the time of perfecting said judgment, to which decision, the defendant, by his counsel, excepted.

The said Justice did thereupon give judgment for the plaintiffs against the defendant for \$1,220 84, and the defendant excepted to such judgment being given.

From that judgment the defendant appealed to the General Term.

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J. N. Balestier, for plaintiff and respondent.

A. J. Vanderpoel, for defendant and appellant.

BY THE COURT. HOFFMAN, J.—The only question in the cause arises upon the refusal of the Judge to admit the testimony offered to show that, the attorney of the plaintiffs in the suit against Hubbard and Barton gave a consent to his going to Philadelphia for the purpose of raising money to pay the judgment. This was rejected on the ground that such a consent would not of itself, and alone, avail as a defence to the sheriff.

We consider this ruling to have been correct.

The case of *Kellogg v. Gilbert* (10 John Rep. 220) settled this point; and was very much like the present in its circumstances.

Dexter v. Adams (2 Denio, 646), is clearly distinguishable. An agent of the plaintiff had concerted a fraudulent scheme, to decoy the parties off the limits, and had a *capias* in his pocket, to be delivered to a coroner to serve upon the sheriff, at the moment of accomplishing his intended fraud.

The statute (2 R. S. 262, § 26-29) has been referred to. It extends the authority of the attorney beyond the entry of the judgment, and enables him to receive payment, and acknowledge satisfaction at any time within two years.

In *Gorham v. Gale* (7 Cowen, 744), the power of an attorney during the progress of a suit, was treated of at length, in the opinion of Mr. Justice Woodworth. It was stated that, although he had not power to enter a *retraxit*, or discharge a party from execution without payment, he may and ought to exercise his discretion in all the ordinary occurrences which take place in relation to the cause.

In *Benedict v. Smith* (10 Paige, 127), the Chancellor, after advert-
ing to the statute, and speaking of the powers of the attorney of record of a plaintiff in an action, in which the plaintiff had recovered a judgment, said, "The defendant was authorized to consider him as the attorney of the plaintiffs in the judgment, and as possessing the general power and control over the proceedings for the obtaining satisfaction of that judgment, which the attorney on record has, by virtue of his general retainer, in other cases." "If the property levied on by the execution in

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this case had not been sufficient to pay the whole debt, if sold by the sheriff in the ordinary way, a question of some importance might have arisen, whether the attorney on record, who is employed to collect a doubtful debt for his client, may not, even after judgment, receive a part of the debt, and discharge the lien of the judgment upon receiving security for the residue of the debt."

But in that case, the Sheriff had levied upon property sufficient to discharge the debt. The attorney took an assignment of a security, and in his own name, and discharged the judgment. It was held that he had exceeded his powers; but as the client had ratified his acts, such ratification was held equivalent to a prior authority, and the client was held to be concluded by them. This statute and case do not, in our opinion, warrant so great a change in the long settled law as must be effected, in order to hold the present defendant discharged by the facts offered to be proved.

In a late case Baron Parke said, that the attorney, in a Court of law, is not like a proctor in the ecclesiastical courts, "*dominus litis*, but he is the mere agent of the suitor." (*Thatcher v. D'Aquilar*, 11 Ex. Rep. 486).

We think the judgment must be affirmed.

Affirmed accordingly.

WILLIAM SMALL v. THOMAS M. SLOAN.

A guaranty, before the Code, was assignable, so as to give an equitable title to the assignee, although he could not sue thereon in his own name; but, under the Code, it is not merely assignable, but the action thereon must be brought in the name of the assignee, as the real party in interest.

There is no presumption and no rule of law that can warrant a Court or jury to infer, from the mere fact that the body of an instrument or endorsement is not in the hand-writing of the signer, that it has been altered, or that it did not appear in the same form when the signature was made.

When circumstances of suspicion are proved, the party claiming under the paper may, properly, be required to satisfy a jury that it was signed in the form in which it appears; but in all other cases, the plaintiff is bound to prove the signature

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alone, which is *prima facie* evidence that the defendant contracted the obligation that the paper imports.

Judgment for plaintiff, upon verdict, with costs.

(Before DUMER, SLOSSON, and WOODRUFF, J.J.)

Heard, April 8th; decided, June 13th, 1857.

THIS action comes before the Court on a motion, by the plaintiff, for judgment on a verdict in his favor, taken subject to the opinion of the Court at General Term.

This action was brought to recover the balance alleged to be due to the plaintiff, as assignee of Small, Williams & Co., and payable upon three notes, and the defendant's guarantee of two thereof. That is to say:

A note for sixty-five dollars, made by the defendant, payable to the order of the said firm of Small, Williams & Co., and by them endorsed to the plaintiff. (In respect to this note there is no controversy; though if the payments, which are admitted, and the amounts otherwise realized, were to be applied to this note only, the plaintiff could recover nothing.)

A note dated June 22d, 1843, made by B. W. Green, for fifty dollars, payable five days after date, to the order of the defendant.

And a note, or due bill, made by the said Green, dated May 30th, 1845, in these terms: "Due Mr. Thomas M. Sloan order, two hundred and thirty-five dollars, payable on demand, for value received."

Upon the back of each of the last mentioned two notes are endorsed the following words;

"For value received, I hereby guarantee the payment of the within, July 8, 1843,

THOS. M. SLOAN."

The complaint avers the making and delivery of the above guarantee by the defendant, and the delivery of the notes so guaranteed to Small, Williams & Co.; that neither Green nor the defendant has paid the same; that Small, Williams & Co. have transferred the same to the plaintiff. But the complaint does not aver that payment of either the said note or due bill has been demanded from the maker thereof.

The answer, after setting out a payment on the note made by the defendant, denies that he ever executed and delivered any

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such guaranties, as are set forth in the complaint, upon the notes of Green.

The action was tried before Mr. JUSTICE DUER and a jury, in January, 1854.

Upon the trial the plaintiff produced the notes of Green, and proved the signature of the defendant to the guaranties endorsed thereon; and the witness, on cross-examination, testified that the writing of the guaranties so endorsed was not that of the defendant, but the signatures only. Upon this evidence and proof of the interest upon the several notes, the plaintiff rested.

The defendant moved for a non-suit, which was denied, and the defendant excepted to the decision.

Thereupon, by direction of the presiding Justice, the jury found a verdict for the plaintiff, for \$364 94, subject to the opinion of the Court, on a case to be made, with liberty to either party to turn such case into a bill of exceptions.

W. M. Evarts, in moving for judgment for the plaintiff upon the verdict, argued as follows:

The proof of the signature of a party to an instrument is *prima facie* evidence that the instrument written over it is the act of the party; and this *prima facie* evidence will stand as proof unless the defendant can rebut it by showing, from the appearance of the instrument itself, or otherwise, that it has been altered.

There is nothing in the appearance of the notes in question from which an alteration or addition to the endorsement can be presumed.—*Glossop v. Jacob*, 4 Campb. 227.

The general presumption of innocence is sufficient to outweigh any conjectures that might be drawn from the appearance of the guaranties, and the facility of inserting them over a blank endorsement.—*Best on Presumptions*, p. 58.

Fraud or forgery is not to be presumed when any other explanation is consistent with the facts.

Endorsers enjoy the same security as all other parties to instruments, in the fact that fraudulent and felonious tampering with instruments after execution, is not to be anticipated.

But if the rule contended for by the defendant prevails, the holders of commercial paper will be in great jeopardy, seldom having the means of proving more than the signature.

In the numerous cases where the burden has been held to be upon the party offering paper to explain its condition, some alteration, honest or fraudulent, was manifest and undisputed.

Knight v. Clements, 8 Ad. & El. 215; *Henman v. Dickinson*, 5 Bingh. 183; *Carris v. Tattersall*, 2 Man. & G. 890.

But where there is no alteration manifest upon inspection, or where the fact is doubtful, the burden is upon the defendant. 1 Saund. Ev. & Pl. 78.

C. W. Sanford, for the defendant, made and argued the points stated in the opinion of the Court.

BY THE COURT. WOODRUFF, J.—There is nothing in the case, as made up for the hearing at the General Term, which shows what questions of law were raised on the trial herein, or the grounds upon which the motion for a nonsuit was urged.

The questions, which the counsel for the defendant has presented for our consideration, are shown by his points submitted, in the following words:

"1. The defendant was an endorser, over whose name the plaintiff wrote a guarantee. He was entitled to all the rights of an endorser."

"2. No proof of demand of the notes upon the drawer was made, and no notice of non-payment."

"3. If the endorsement was a guarantee, it was not assignable."

"4. The complaint should have been dismissed."

Nothing was suggested on the argument in support of the fourth proposition, except what was said by insisting upon the other three, from which the fourth was made an inference.

As to the assignability of the guarantee, it is sufficient to say, that although a special guarantee was not negotiable, and an assignment would not authorize a suit in the name of the assignee, before the Code—(and that is all that was decided on this point in the case cited; *Lamourieux v. Hewit*, 5 Wend. 307.) Yet an assignment would always pass the equitable title, and the guarantee could be enforced for the benefit of the assignee, but in the name of the person to whom the guarantee was made.

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Now, as actions must be prosecuted in the name of the real party in interest, and as the fact of actual assignment to the plaintiff is alleged in the complaint, and not denied in the answer, the objection fails.

The 1st and 2d points appear to proceed upon one ground, and were so argued by the defendant's counsel, viz.:

Inasmuch as nothing appears upon the back of the two notes, in the handwriting of the defendant, except his signature, it is to be presumed that when he wrote his name, nothing else had been written thereon, i. e. he endorsed the notes in blank, and is, therefore, to be regarded as an endorser, and as such cannot be charged without proof of demand of payment of the maker, and notice of non-payment to himself.

This claim calls upon us to presume, that the plaintiff or his assignors have been guilty of a fraud, if not of a forgery, by writing over the defendant's signature, a contract which he never made nor consented to.

We know of no such presumption as is here suggested, nor of any rule by which we can infer, or which warrants a jury in inferring, from the mere fact that the body of an instrument or endorsement is not in the handwriting of the signer, that it has been altered, or that it did not appear in its present form when the signature was made.

Where there is any evidence, however slight, that the endorsement was originally a blank endorsement, the circumstance that the writing is not that of the endorser, may properly have weight. And whenever there are circumstances of suspicion, the party claiming under the paper may properly be required to satisfy a jury, that the paper was signed as it now appears. (See *Mabe v. Sniffen*, 2 E. D. Smith, 1.) But we have been referred to no authority, nor are we aware of any principle upon which we can say, that the plaintiff was bound to do more than produce the endorsement, and prove the signature thereto. That was *prima facie* evidence, that the defendant assumed the obligation imported by it, as truly as proving the maker's signature to a promissory note, the body of which is not in his handwriting, is *prima facie* evidence of his promise to pay the sum of money mentioned in it, and according to its tenor.

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The defendant was not, therefore, entitled to all the rights of an endorser, and as such, at liberty to resist the claim on the ground of want of demand, and notice of non-payment.

It was not a commercial endorsement entitling the endorser as such, to demand, protest, and notice.

If the point now taken can be construed to mean, that treating the endorsement on the back of the notes as a guarantee, there must still be a demand before the defendant could be charged, it must suffice to say, that no such point appears to have been taken at the trial, and the fact, set up in the answer, that Green, the maker, did, after the notes were passed to the plaintiff, make a payment thereon, sufficiently indicates that he regarded them as a then present debt, and that he was in default in not paying the balance.

The case was obviously tried, and defended, upon the idea that the plaintiff was bound to show that the signature of the defendant was not, when written, a blank endorsement, and that in the absence of such proof, he is entitled to be regarded as a mere endorser; and with the rights of endorser, entitled to demand of payment, and notice of non-payment. This, we think, is not well founded.

Judgment should be ordered for the plaintiff upon the verdict. Ordered accordingly.

JAMES MOORE v. JOHN J. V. WESTERVELT, Sheriff, &c.

When a sheriff takes possession of personal property, under service of legal process, he is bound only to ordinary care and diligence in its custody, i. e. the same care and diligence that a prudent man would take of his own property. But if the sheriff leave the property in the possession of the defendant in the action, he becomes an insurer of it to the plaintiff, and nothing will excuse him in the event of a loss, but the act of God or of public enemies.

Such is the settled rule, where property is taken by the sheriff under an execution, and, in reason, the rule is just as applicable, when the possession is so taken in an action, under the Code, for the delivery of personal property.

In such an action, the sheriff did not take actual possession of the property; and it was proved, in the present suit, which was brought by the plaintiff in the former,

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that the deputies, whom the sheriff had directed to take charge of it, were guilty of gross negligence.

It was therefore *held*, that he was liable to the plaintiff to the full extent of the damages which it was proved that the property had sustained.

Held further, that the right of the plaintiff to recover such damages, was not waived nor affected by his receiving, from the defendant, the delivery of the goods in their damaged state.

It is probable that the sheriff, in an action against him for the recovery of such damages, is estopped from denying the title of the plaintiff, but, at any rate, a bill of lading, showing the goods to have been consigned to the plaintiff, is *prima facie* evidence of his ownership.

A Judge is not bound to submit to the jury the question of negligence, although there may be a conflict of evidence in relation to some of the facts relied on as proving it,—if, rejecting the conflicting evidence, the negligence charged is conclusively proved by the defendant's own witnesses.

New trial denied, and judgment for plaintiff affirmed with costs.

(Before DUER, SLOSSON, and WOODRUFF, J.J.)

Heard, April 12; decided, June 20, 1857.

THIS action comes before the Court, at General Term, upon a verdict for the plaintiff, taken, subject to the opinion of the Court at General Term, upon the questions of law raised on the trial, and which were there ordered to be heard, in the first instance, at the General Term. The entry of judgment, in the meantime, being suspended.

The action was brought to recover the damage which, the plaintiff alleged, he had sustained from the neglect of the defendant to take proper care of 161 tons of coal belonging to the plaintiff, and which, in an action for the delivery of personal property, had been placed in the custody of the defendant, as sheriff of the city and county of New York. A new trial was granted by this Court in March Term, 1853, and the reader is referred to the report of the case, (2 Duer, 60), for a statement of the pleadings and of the material facts forming the history of the case.

The second trial was had before Chief-Justice OAKLEY and a jury, in March, 1856. The Chief-Justice directed the jury to find a verdict for the plaintiff, leaving to them, only, the question of the amount of damages. The exceptions and questions of law, subject to which this verdict was taken, sufficiently appear in the points of the counsel.

H. H. Burlock, for the plaintiff, in moving for judgment on the verdict, made and argued the following points:

I. The bill of lading was properly received in evidence. (2 Phillips' Evidence, 37, 38, and 39; *Hudson v. Parry*, 3 Taunton, 303; Note 131, p. 83, to Phillips' Evidence; Abbott on Shipping, 827, 837, and 839; *Dickerson v. Seelye*, 12 Wend. 102.) And also the bill of parcels. (2 Phillips' Evidence, 39.)

II. The several objections to evidence, taken on the trial, were all properly overruled.

III. The motion to dismiss the complaint, was properly overruled by the Court, upon the following grounds:

First. The bill of lading and the bill of parcels was evidence of the plaintiff's title to the coal. (2 Phillips' Evidence, 37, 38, and 39; *Hudson v. Parry*, 3 Taunton, 303.)

Second. It was alleged in the complaint, and not denied by the answer, that the surety had justified before one of the Judges of this Court. (*Kelsey v. Weston*, 2 Comstock, 500.)

Third. It does not appear that the defendant in the replevin suit, had excepted to the surety of the plaintiff, and besides, it was immaterial to the sheriff whether the surety justified before the Judge or a Commissioner of Deeds; that was a matter between the parties in the replevin suit, and the defendant therein had a right to consent that the affidavit of justification should be made before one of the Commissioners of Deeds, instead of a Judge of the Court.

Fourth. The sheriff did not set up any such defence in his answer, nor put his refusal to deliver the coal to the plaintiff upon any such ground.

Fifth. The settlement of the replevin suit, and the acceptance of the coal by the plaintiff, was not an extinguishment of the claim for damages in this action.

IV. There was no question to submit to the jury, but the amount of the plaintiff's damages.

First. Upon the facts admitted by the pleadings, and those clearly proved by uncontradicted testimony, the plaintiff is entitled to recover.—2 Duer, 63 and 64.

Second. It was the duty of the Sheriff to have taken the coal out of the vessel, and from the possession of Hoffman, the master of the vessel; not having done so, he is liable to the plaintiff in this action, without regard to the care that was taken of it.—*Browning v. Hanford*, 5 Denio, 588; 5 Hill, 588; Opinion of

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Cowen in the Supreme Court, and Putnam in the Court of Errors, and authorities there cited; *Lisher v. Pearson*, 2 Wend. 345; 11 Wend. 58; 17 Wend. 518.

Third. The evidence shows that the vessel did not lay in a secure place in which to keep the coal.

Fourth. If the Sheriff chose to use the vessel to keep the coal in, it was his duty to have taken care of its safety against sinking, and to have removed the vessel to a place of greater safety when exposed to a severe storm; and as the evidence shows, the vessel would have been safe on the other side of the pier, and he neglected to move her, or watch her safety, he is liable in this action.

Fifth. There was no evidence on which to submit the question, whether the Sheriff took ordinary or extraordinary care to guard the coal from the danger of sinking; the proof being by Hallenbeck himself, that he was not charged to take care of its safety from sinking, and had nothing to do with it; and by him and Quin, that no person, on behalf of the Sheriff, was on board the vessel the night she sunk.

Sixth. There was no evidence authorizing the submission to the jury of Moore's assent to the coal remaining on board of the vessel until the surety justified; besides, no such defence was set up in the answer.

V. There was no error in the charge of the Judge, nor in the refusal to charge as requested by defendant.

E. W. Stoughton, for the defendant, rested his argument upon the following points:

I. The Court erred in admitting as evidence the bill of lading.

This instrument was signed by the master, Lewis Hoffman, and his statements therein contained were not, for any purpose, evidence against the defendant, although the Court admitted it to prove ownership of the coal in the plaintiff, as well as the amount thereof actually on board the schooner at the time of the loss.

II. There was no evidence that the plaintiff owned the coal, nor of the amount actually on board at the time of the loss—nor that any part of the coal sunk was not recovered.

The only damage shown to have been sustained by the plain-

tiff is, that he paid one half of \$570—the sum it cost to raise the vessel and coal.

III. Unless the sheriff failed to exercise ordinary care and caution in keeping the coal, he is not liable for its loss, nor for any injury it may have sustained by being sunk. (*Burke v. Trevitt*, 1 Mason's Rep. 96, 101; *Browning v. Hanford*, 5 Hill, 588–591; *Jennings v. Joliffe*, 6 J. R. 9; *Story on Bailments*, § 180–660.

IV. Whether such care and prudence were exercised or not, was a question of fact, to be determined by the jury.

1. Upon the testimony of the plaintiff, the Court could not say that the jury were bound to find that the defendant was guilty of negligence, in not securely keeping the property.

2. Upon the evidence introduced by the defendant it appeared, that he, by his officers and agents, exercised all that care and caution which were required of him by law.

Hallenbeck, the sheriff's keeper of the property, testified, that he was acquainted with the mode of fastening vessels at and about the piers in the harbor, and that he considered the vessel in a safe place, and the coal secure. He also denied that the captain of the schooner ever proposed to remove her to the south side of the pier, or that he, the witness, objected to his so doing.

V. Upon the evidence in the case, it was for the jury to determine, whether such care had been exercised in keeping the property, as the law, and his official duties imposed on the defendant.

The vessel had been selected by the plaintiff for the transportation of his property, and the sheriff is not to be held guilty of negligence, merely because he considered her a secure place in which to keep the coal at the wharf, until he could determine whether the sureties of the plaintiff would justify; in which event only, he was to deliver the property to him.

The Court, therefore, erred in holding, that upon the evidence, the defendant had been guilty of negligence, and was therefore liable.

This was a question of fact, to be determined by the jury upon conflicting testimony.

VI. The Court, in granting a new trial in this case, did not decide that the sheriff was liable, unless he had failed to exercise

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ordinary care and prudence in keeping the property, but held, that there was no evidence in the case showing that such care and prudence were exercised. Upon the last trial, such evidence was introduced.

The other ground on which the new trial was granted was, that the Judge erred in charging, that although the schooner might be an insecure place in which to keep the coal, yet no liability would attach to the sheriff merely in consequence of his having left it in that place, if the jury found that Moore assented to its being left there; especially as there was no evidence showing that such assent was given.

VII. There should be a new trial of the case.

BY THE COURT. SLOSSON, J.—The case, as now presented, does not appear to be materially different from what it was on the former trial.

By section 215, of the Code, it is provided, in an action for the recovery of the possession of personal property, where an immediate delivery is claimed, that the sheriff having taken the property "shall keep it in a secure place and deliver it to the party entitled thereto, on receiving his lawful fees for taking, and his necessary expenses for keeping the same."

Unless the property is claimed by a third person (section 216), the sheriff is bound to deliver it to the plaintiff after the expiration of three days from the original taking of it, and service of the plaintiff's affidavit and notice on the defendant, provided the defendant himself has not within that time required a return thereof, and given the requisite undertaking (section 211), and in such event he must deliver it, if the defendant's sureties fail to justify as provided by section 212.

If the sheriff takes the property into his own custody, he is bound only to ordinary care and diligence in the custody of it, that is, he is bound to take that care of it which a prudent man would take of his own property, but if he leaves it in the possession of the defendant in the action, he becomes an insurer of it to the plaintiff, and nothing will excuse him for its loss but the act of God, or of the public enemies.

This is the rule applicable to sheriffs, who have taken property under execution, and there is no reason why it should not

be equally applicable, where property is taken under claim and delivery in replevin.—*Browning v. Hanford*, on appeal, 5 Denio Rep. 586.

In the present instance the sheriff did not take actual possession of the property replevied, which was a cargo of coal, in a schooner, lying at the wharf—he contented himself with serving the papers on the captain of the vessel, who was the defendant in the action, and leaving two men in charge of it, with directions to the defendant not to remove it until the following Tuesday, when the plaintiff's sureties were to justify.

It was during this interval that the vessel was sunk.

On the evidence there cannot be a doubt that the vessel moored where she was, was an "insecure place" for the keeping of the coal—a storm ensued within a very brief period, and she sunk at the wharf with all the coal on board—the evidence is equally clear, that the men who were left in charge of the coal, wholly neglected their duty—one was to watch by day, the other by night—neither on Saturday night, nor on Sunday, nor on Sunday night, during all which time the storm prevailed, do these men appear to have been on board.

On Saturday afternoon, Hallenbeck, one of the two men, was there between five and six o'clock, but he says himself that "he went home and went to bed of nights"—he was a witness for the defendant.

He says, "I left a police officer of that ward in charge of her to see that the vessel was not removed. I gave him no other charge—did not tell him to watch the safety of the vessel from the storm. I had no charge to take care of the safety of the vessel. I was charged by the sheriff, to take charge of the coal, and see that the vessel was not removed. I was not charged to see to her safety from sinking. I did not care to see that any one slept on board."

Quin, one of the hands of the schooner, and who was a witness for the plaintiff, swears, that on Saturday afternoon, the captain of the vessel (defendant in the replevin) was very anxious to have the vessel moved around to the other side of the pier, where she would have been in comparative safety, and that he came there on purpose to do it, and asked the man in charge of the coal, (the sheriff's man) if he would let him do so, but that

he refused to permit him. In this he is contradicted by Hallenbeck, but he is supported by the captain himself, who was sworn for the plaintiff in this action; and substantially also by Blackman the mate. The captain also swears that when the replevin papers were served, he told the deputy sheriff, that if he would not allow the plaintiff to take the coal; he must take it out of the vessel, but that the sheriff said, that he would not, but would deliver it to the plaintiff when the sureties had justified.

In this also, he is contradicted by Hallenbeck, who says, he was present at the interview, and he is also contradicted by the deputy.

The defendant's counsel insists that here was a conflict of testimony sufficient to have carried the case to the jury, on the question; whether the defendant had exercised that care in the keeping of the property which the law, and his official duty imposed on him?

We think that, under the rule above laid down, the defendant's liability does not depend on the mere question of his diligence in taking care of the property where it lay, or of the vessel in which it was laden—having seen fit to leave it there in the actual possession of the defendant in the replevin, he assumed all risks; but if it does depend on the question of diligence, we think, on the evidence of Hallenbeck himself, not to speak of the others, that the proof is overwhelming that the sheriff was guilty of the grossest negligence, and that a verdict the other way could not be sustained.

Hallenbeck says, "He should have thought the vessel was safe, but he had nothing to do with her safety." That is the thing with which he had most to do; the safety of the cargo was wholly dependant on that of the vessel; even if it were not negligence to have left the coal on board in the first instance, it was clearly the duty of the sheriff, having assumed the custody of the coal in such a position, to see that the vessel itself was kept in safety. He was not obliged to wait for the captain's directions; he should have, himself, as a prudent man, applied to the captain to remove the vessel.

It was perfectly obvious from the testimony, that on the side of the ship where she lay, she was exposed to the full force of the storm, from which she would have been partially, if not

wholly screened, by hauling around to the other side of the slip, and that her situation where she lay, heavily laden almost to the water's edge, was one of imminent peril—the evidence is, that she was laden to within four to six inches of the water's edge.

Quinn, one of the hands belonging to the schooner, swears there was plenty of room on the other side of the pier for her; that another coal vessel was lying on the other side, loaded nearly the same as she was, and which suffered no damage, and he does not believe she would have sunk there.

It seems almost incredible, that with such obvious means of safety before them, these men, whose special duty it was to protect the coal, should have so recklessly left the vessel and her cargo to withstand the winds and waves which, in her laden condition and exposed position, threatened her every moment with destruction. They seem to have considered, that so long as they prevented the removal of the vessel from the berth which she occupied at the slip, their whole duty in respect to the custody of the coal, was discharged; and even this duty was, if performed at all during the night, performed by some policeman of the district, who was in no way responsible for the safety of the coal.

We cannot doubt that the Chief-Justice was justified in removing all questions from the jury, except those of damages.

The vessel was actually raised by the owners, on an agreement with the plaintiff to divide the expense in proportion to the values of the cargo and vessel: the expense was \$529, and the plaintiff's share of it was \$264 50.

The sheriff was not bound by this agreement, to which he was not a party, and the Judge left it to the jury to say what was a fair and reasonable amount to allow the plaintiff for the expense of getting up the coal. He also left it to them to determine the amount which should be allowed for the deterioration of the coal by its submersion. In both particulars he was right.

We question whether the sheriff is at liberty to put in issue the title of the plaintiff to the goods. As against the sheriff, he is, *prima facie*, the owner. When the sheriff takes the property under this process, he takes it as the plaintiff's property, and the law will not tolerate that he shall relieve himself from responsibility for his own negligence, by denying the plaintiff's title to the

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property; but if it were otherwise, the bill of lading was good evidence, as against him, of that title—at least *prima facie*. It established in the plaintiff a right to the possession of the goods.

It was also good *prima facie* evidence of the quantity of coal on board.

The defendant presented eleven distinct propositions to the Judge, to be submitted as law to the jury, each of which he refused to charge, and for which refusal in each particular, his counsel excepted.

Under the views we have taken of his responsibility, by reason of leaving the property in the defendant's hands, we think all these exceptions were properly overruled. A doubt, perhaps, may arise as to the third and seventh request.

The third was in substance a request to charge that if the jury believed that the plaintiff assented to the property remaining in the vessel, the defendant was not liable, and that such assent might be inferred from the plaintiff's acts, in connection with the facts proved in the case.

In respect to this, it is perhaps enough to say that the whole responsibility of putting the property in a place of security rested on the defendant, and nothing short of the most positive evidence of an assent of the plaintiff to his selecting any particular place of deposit should be allowed in exculpation of a breach of his duty in this respect. There was no such evidence in the case, and none which would warrant the jury in finding an assent at all. The Judge therefore properly refused to submit that question to the jury.

The seventh request involved the proposition that the settlement of the replevin suit, and the delivery of the coal by the sheriff to the plaintiff in that suit (plaintiff also in this), and the acceptance thereof by the latter, was an extinguishment of his claim to damages.

The evidence is, that after the coal was got up, the deputy sheriff went to the plaintiff for the purpose of delivering it to him—that he asked him if he was ready to receive it? he said, yes. The sheriff told him to go and take it, and the plaintiff said he would send his carts and get it; which he did.

This is not such a delivery as the law contemplates. It was not the coal in the condition in which the sheriff had taken it

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under his authority, and the receiving it by the plaintiff was no waiver of his claim for damages against the sheriff, if the sheriff was liable for damages. It would have been idle for the plaintiff to have refused to receive the coal.

The case has not the remotest analogy to that of waiver of a condition precedent, or of a forfeiture, or to a release, estoppel, or any other act by which a right accrued is lost by the agreement, default, or laches of the party.

Judgment should be for the plaintiff.

Judgment was ordered accordingly.

ROBERT L. TILTON v. THE HAMILTON FIRE INSURANCE COMPANY.

Although the maxim that "*causa proxima non remota spectatur*," is the rule that governs the liability of Insurers, yet in its application, the words, "proximate cause," are not to be understood in their strict and limited sense, as meaning only the cause that immediately precedes and directly occasions a loss.

The maxim, understood in this limited sense, would confine the liability of insurers to losses produced solely by the direct agency of a peril, insured against, upon the property insured.

It is settled now, however, that insurers, both upon Marine and Fire Policies, are not only responsible for losses produced by the direct action of a peril insured against, but losses in their nature consequential.

The general rule may be stated in these words, that insurers are not liable for consequential losses, other than such as are physically or legally necessary, unless it appears that the property insured, was involved in a peril insured against, and must have perished from that cause, had the peril continued to operate.

Under this condition, there are two classes of consequential losses, for which insurers are held to be answerable; first, where the loss, although not a necessary, is a natural consequence of the peril insured against, by natural, meaning a usual and probable consequence, and such, therefore, as it is reasonable to believe, was in the contemplation of the parties, when the contract was made.

Second, where the property insured is extricated from the peril by which it must have been destroyed by means not anticipated by the parties, but by which it is taken from, and never again restored to the possession of the assured.

Held, that a loss by the stealing of goods at a fire in a large and populous city, is a consequential loss that may, properly, be referred to each of these two classes, and is, therefore, recoverable, (although fire is the only risk mentioned in the policy,) as a loss occasioned by fire.

Judgment for plaintiff upon the verdict.

(Before DUEK, CH. J., and BOSWORTH, HOFFMAN, SLOSSON and WOODRUFF, J.J.)

Heard, June 6; decided, June 27, 1857.

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THIS action comes before the Court at General Term, on a verdict taken, subject to the opinion of the Court, for its decision of questions of law arising at the trial, and which were there ordered to be heard, in the first instance, at the General Term. The case made is as follows: viz.

"This action was brought upon a policy of insurance made by the defendants, to recover from them their proportion of the loss and damage sustained by the plaintiff by the destruction or damage of the property insured, by a fire which occurred on the morning of the 5th of February, 1855.

"By the pleadings in the action, the making of the policy and the occurrence of the fire were admitted, and also that the goods of the plaintiff saved from the fire were damaged to the extent of nine hundred dollars. In addition to this, the plaintiff claimed that there was a total loss of goods to the amount of \$3,459 85, covered by the policy.

"The defendants denied the total loss of any goods, and claimed that the plaintiff, on presenting his claim to the defendants, had made false statements as to the amount of his loss, whereby, under the terms of the policy, he had forfeited his claim to the amount of damage admitted to have been suffered.

"The action came on to be tried before Mr. JUSTICE DUEK, and a jury, on the 21st April, 1856.

"Upon the trial the plaintiff read in evidence the policy of insurance, bearing date June 1st, 1854, whereby the defendants insured the plaintiff against loss or damage by fire, to the amount of \$1,500, on his stock of ready-made clothing, contained in the building No. 140 Fulton street, New York; also, \$400 additional on the store fixtures, furniture, &c., for the term of one year thereafter.

"The plaintiff then offered evidence tending to show that on Saturday, the third day of February, 1855, the store was closed at the usual hour in the evening, and that neither the plaintiff nor any of his clerks again entered it. That on Monday morning, the fifth of February, 1855, when the plaintiff and his clerks came to the store, they found the building entirely destroyed. That neither the plaintiff nor any of his clerks were present at the fire. That in the morning after the fire, the plaintiff was

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notified by the agents of the defendants, that they had removed his goods from the store, and that they were stored in the basement of the Sun Building, and soon afterwards, the plaintiff having hired the store No. 194 Fulton street, the defendants delivered to him the goods saved, which were taken from the basement of the Sun Building to the store No. 194 Fulton street, where an inventory was taken of the same. That by this inventory it appeared that the value of the goods saved amounted to \$9,488 66. Evidence was also offered by the plaintiff, tending to show that on the night previous to the fire, when the store was closed, there was a stock of goods on hand of the value of \$12,948 01. That many goods which were in the store on the evening previous to the fire were not among the goods delivered to the plaintiff after the fire. That the fixtures, &c., covered by the policy to the value of \$500, were, together with the building, totally destroyed by the fire in question.

"The defendants gave evidence tending to show that in making up the account of the goods saved from the fire, the plaintiff had fraudulently undervalued the goods, so as to increase the apparent amount of his total loss. The plaintiff offered counter evidence on this point, tending to show that the accounts were in all respects, just and true.

"The defendants then offered evidence tending to show that the fire in question was discovered about midnight, in the third story of the building No. 140 Fulton street; that a few minutes thereafter the insurance watch arrived, broke open the doors, took possession of the store, and commenced moving the goods across the street; that the police formed lines across the street, about midway of the block above and below the fire, to prevent persons approaching the fire; that all the goods were removed from the store before the fire reached that portion of the building occupied by the plaintiff, and were taken across the street, and piled up on the side-walk, extending from the curb-stone back against the door of a hotel then open; that the goods were covered by oil-cloths, and policemen were stationed in charge to watch them; that after all the goods had been removed across the street, they were taken to the Sun Building, a hundred feet distant, and stored in the basement, which was locked up, and the key retained by one of the insurance agents until delivered to

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the plaintiff, the next morning; that all the goods stored in the Sun Building were delivered to the plaintiff the next morning.

"The plaintiff gave evidence tending to show, that a large number of persons were admitted inside the lines formed by the police; that persons passed them freely; that there were several hundred persons assisting in removing the goods, including policemen, insurance watch, and others; that there was a great deal of confusion; and that goods might have been stolen and carried away without being noticed.

"The Court thereupon charged the jury, amongst other matters, as follows:

"That if the witnesses on the part of the plaintiff are to be believed, the plaintiff had in his store on the night of the fire, goods to the value of \$12,948 01, while the goods saved by the defendants and delivered to the plaintiff at the Sun Buildings, on the morning after the fire, only amounted to \$9,488 66, leaving a deficiency of \$3,459 35, which the plaintiff claims were lost or destroyed by the fire. In opposition to this we have the testimony on the part of the defendants, that all the plaintiff's goods were removed by them from the store before the fire reached that portion of the building. None of the witnesses, however, can testify that all the goods removed from the store were taken to the Sun Building, and these statements can only be reconciled upon the supposition that a portion of the goods were abstracted during the fire. Although it is a serious question, and in my judgment a very doubtful one, whether the insurers insuring against fire alone, are bound to make good any loss resulting from stealing the goods by persons at the fire, yet for the purposes of this trial, I shall charge you that it is immaterial whether the goods were actually burned, or were abstracted or stolen by persons at the fire. If you are satisfied that the plaintiff was not guilty of any fraud in making the statement as to the amount of his loss, he is entitled to your verdict for the sum of \$400 insured upon the fixtures, and also for three-twenty-eighths of that portion (if any) of the goods in the store on the night of the fire, which were either burned or abstracted by persons at the fire. If you find for the plaintiff for the full amount claimed, your verdict will be for \$900.

"The counsel for the defendants thereupon excepted to that

portion of the charge in which his honor charged the jury that the defendants were liable for goods stolen at the fire.

"The jury thereupon returned a verdict in favor of the plaintiff, for nine hundred dollars, which was directed by the Court to be entered, subject to the opinion of the Court upon the question as to the liability of the defendants for goods stolen; to be heard in the first instance at the General Term, on a case to be made, with leave to either party to turn the same into a bill of exceptions."

It was first argued at the February General Term, 1857, before BOSWORTH & HOFFMAN, J.J. On the 11th of April, 1857, they severally delivered written opinions, and disagreeing in their conclusions, ordered a re-argument. On the re-argument, Judge HOFFMAN's opinion, somewhat modified, was delivered as a dissenting opinion, and is published accordingly, as a part of the report of this case. Judge BOSWORTH's opinion is as follows:

BOSWORTH, J.—Certain facts of much moment, and beyond dispute, which are established in this case, must be kept steadily in view, in applying to it the rules of decision, by which the rights and liabilities of the parties are to be determined.

The store was burned down, and if the goods had not been removed, they would have been entirely consumed by fire.

A few moments after the fire was discovered the Insurance watch arrived, broke open the doors, took possession of the store, and commenced moving the goods across the street. The police formed lines across the street, about midway of the block, above and below the fire, to prevent persons approaching the fire. It may be assumed then, that the goods were removed from an honest motive to save them from a total destruction by fire, which was inevitable, if they had been left on the premises mentioned in the policy.

It may also be assumed that extreme vigilance and precaution were used, to prevent any of them from being lost by theft, or otherwise, during the process of removal. The defendants cannot object, that the persons who undertook, and superintended their removal, might not properly do so, for the purpose of

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avoiding a heavier loss than would have occurred directly from an actual burning of the goods, if such removal had not been attempted.

By this effort, the loss instead of being total, is partial only. But notwithstanding all the vigilance and precautions used, there was a loss. That loss, as we must assume, was caused directly by a stealing of the goods.

Is that loss, under the peculiar facts of this case, a loss by fire, within the meaning of the policy?

The fire created a necessity of immediately removing the goods, in order to save the whole or a part of them from being burned up.

In making such a removal, even if all be removed before the fire reaches that part of the building from which they were taken, a loss, in spite of all precautions, may be produced by at least two causes incident to such an act.

One is, a partial injury of some of the goods themselves, by their hurried removal, and the confused state in which they may necessarily for a time be thrown together.

Another is, from a theft, or abstraction of some part of the goods. If these are not natural results, it is believed that common experience shows that both, in large cities, are almost invariably inevitable results.

Was not the fire the immediate cause of, though not the active agent in, the destruction of the goods?

The distinction between the proximate and remote cause of a loss, becomes in some cases so faint, that it is difficult to discern it. I think it a sound rule, that when the damage in any particular case is a direct and unavoidable consequence of the occurrence of a peril insured against, the insurers are liable, though the immediate agent was not such peril. All the consequences inevitably flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself. (*Maguire v. New England Marine Insurance Company*, 1 Story, C. C. R. 157. *Kahn v. Corbett*, 2 Bing. R. 205; 2 Arnould, 799.)

The fire in this case created a necessity of removing these goods, and left no other alternative possible, except their total consumption by fire. If they had not been removed, and if the fire had been extinguished before the building was consumed,

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and if by extinguishing it the goods had been partially damaged by water, I understand it to be conceded by all the cases that such a loss would be covered by the policy.

In that case there would have been no damage to the goods from their having come in contact with the fire, or from actual burning.

In the case supposed, the goods, owing to their peculiar position, were damaged by water employed to extinguish the fire. In other words, it resulted from an effort to preserve the goods from contact with the fire: an effort necessarily, as well as properly made, and one which the contract of insurance contemplated would be made in case of fire, to save the insured property from total destruction.

In the present case, the removal was an act necessarily and properly done, not to extinguish the fire, but to keep the goods from coming in contact with the fire, and made, when it was apparent, and the result demonstrates, that it was impossible to extinguish the fire, until the building and its contents were destroyed. This was an act which the contract contemplates would be done on such an emergency. It not only contemplates it, but if the plaintiffs had been apprised of the fire, in time to remove their goods before the fire could reach them, and they, as reasonable and prudent men, knew that they could make such removal, but instead of attempting it had supinely stood by, and had seen the goods consumed, no Court or Jury would charge the Company with the loss, unless coerced by some rule, which they were inexorably compelled to follow.

But an honest and faithful effort is made to prevent the fire from destroying the whole. In consequence of that effort, a large part of the insured property is saved. In spite of it, a part of such property is lost, but not burned. Without such effort all would have been burned. Would not the part that was lost, be lost in consequence of the fire, and unavoidably so lost?

If the insurers are not liable for such a loss occurring under such circumstances, then the assured ought not to be required to make an effort to remove his goods in case of fire in order to save the insurer from greater loss; and the parties who undertake to remove the goods should be charged as wrong-doers, for the consequences of their interference, unless such interference

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could be shown to be necessary to prevent the spreading of the fire, to other buildings. (*City Fire Insurance Co. v. Cortis*, 21 Wend. R. 367; *The Mayor, &c., of New York v. Lord*, id. 17, 285.)

Suppose the fire had reached the goods in question, and some of them had been damaged directly by the fire, and the others had been removed, and none of them had been lost or stolen, but some of those removed had been damaged by the act, notwithstanding the exercise of extreme precaution and care to avoid such a consequence, would not that damage be covered by the policy?

I think it would. (*The Montg. Ins. Co. v. Babcock*, 6 Barbour R. 640; *Case v. The Hartford Ins. Co.*, 13 Illinois R. 676; *Wilbur v. the Protectors Ins. Co.*, 14 Misso. R. 3; *Levy v. Baillie*, 7 Bing. R. 349; *Brondrett v. Hentigg*, 1 Holt R. 149; *Parsons' Mercantile Law*, 526.)

But even in that case, fire would not have been the immediate cause of the damage, unless all such acts as are a cause of damage, and as the fire renders proper and necessary to avoid greater inevitable loss, are to be attributed to the fire itself. In any other view, the removal of the goods damaged by such removal, and not the fire, would be the proximate cause of the loss.

But I can see no distinction in principle, between a partial injury to some of the goods saved by the removal, and a loss of a part of those attempted to be removed, to save the whole from unavoidable destruction, when they are lost in spite of the extreme of human precaution to prevent loss or damage from the act of removal, whether such loss be caused by theft, or some unavoidable casualty during the removal which renders the article valueless.

Condition No. 6, annexed to, and forming a part of this policy, expressly declares, "that in case of fire, or of loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property; and if they should fail to do so, this Company will not be answerable for the loss or damage sustained in consequence of such neglect."

Hence, the duty, by the terms of the policy, was imposed on the plaintiff, in such a state of things as is shown in this case to have existed, to use his best endeavors to save the goods by

removing them. Suppose the plaintiff had been present, and used such endeavors, and in spite of all the care and precaution that could be used for their preservation and safety, some are lost, or stolen, but the residue are saved from a total destruction, which would otherwise have involved all of them. He would have done precisely what the policy required him to do as a condition of retaining the liability of the company for the value of such part, as the use of his best endeavors could not save from injury. As to those which his great efforts, and vigilance have saved unharmed, he has no claim against the company, because as to them there is no loss. But on the defendants' theory, the company is not liable for the loss of those which human effort and care could not save, because they were not consumed by fire. Yet it was his duty to remove all of them, because by the best endeavors that could be used all could be removed. All having been removed, there is no liability, because those which are saved are uninjured, and those which it was impossible to save, were not burned or damaged by fire. And yet the fire, by the express terms of the contract between the parties, made it the duty of the insured to remove the goods, in the condition of things existing at the time, if it was reasonably certain that such an act would save the company from a greater loss than would have fallen upon it if no removal had been made.

Parsons, in his treatise on Mercantile Law (p. 526) expresses the opinion, that such a clause in a policy strengthens the claim of the insured for injury caused by an endeavor to save the goods by removing them.

I cannot resist the conclusion, that such a loss was one which the parties to the contract contemplated might occur, and that it was the intent of the parties, that any loss which should unavoidably result from the fire should be covered by the policy, although not caused directly by actual burning.

Case v. The Hartford Fire Insurance Company, 18 Illinois Rep. 676, is a case in point. Although the court was divided in opinion, the argument in support of the judgment rendered appears to me to be sound and satisfactory.

I think the question was properly submitted to the jury. There was no pretence of negligence or want of care on the part of the plaintiff. There was and could be no pretence that there was

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the omission of any proper precaution for the safety of the goods during their removal.

There was no suggestion, and probably there could have been none, that those who labored for the safety of the goods, were trespassers, and that their interference was unauthorized and tortious.

No such objection can come from the defendants, who assumed, that the removal was by their agent, and whose acts they adopted, and treated as not only justifiable, but proper to save themselves from the greater peril of a total loss.

The plaintiff, in my opinion, should have judgment on the verdict.

The cause was re-argued on the 6th of June, 1857, before DUEB, C. J., and BOSWORTH, HOFFMAN, SLOSSON, and WOODRUFF, J.J.

D. D. Field, for plaintiff.

First.—The only question presented by this case is, the liability of the defendants for goods stolen at the fire.

Second.—The liability of insurers extends not only to the loss of goods by actual burning, but to the losses consequent upon the fire—as, for example, by the water used in putting out the fire, the trampling of the firemen and others engaged at the fire, the falling of the floors and walls, and the wilful destruction or abstraction, by the firemen and others, of the goods insured.—*Levy v. Baillie and others*, 7 Bing. 849; *Angell on Insurance*, 112, 115, 260.

Third.—By the terms of the policy, the defendants insure the plaintiff against loss and damage by fire, to the amount of fifteen hundred dollars, upon the property insured. This language is broad enough to cover all the loss claimed. The cause of the loss was the fire, and the goods were as fully lost to the plaintiff, as if they had been actually burned.—*Brondrett v. Hentigg*, 1 Holt, 149.

Fourth.—If the indemnity did not extend to these consequent losses, it would be very inadequate; for the greater portion of the loss at any fire results from them, and not from actual burning.

Fifth.—The agents of the defendants having, for their own indemnity, broken open the doors in the absence of the plaintiff, taken possession of the goods, and undertaken to remove the

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same, are liable for any loss which resulted from the consequent exposure of the goods.

Sixth.—If the exception to the testimony respecting thefts at another fire where similar precautions were taken, is to be noticed on this argument, the exception must be overruled, for the evidence clearly tended to show that such precautions and care taken at this fire were not a protection against theft. The precautions were proved for the purpose of showing that a theft was thereby rendered impossible, or extraordinarily improbable. After that, evidence showing that these precautions in practice proved unavailing, was entirely competent.—*Howard v. The City Fire Ins. Co.*, 4 Denio, 502.

E. J. Phelps and *E. W. Stoughton*, for defendants.

I. The defendants are not liable for goods stolen. Their insurance was against fire. Theft is not fire.

Fire must be the proximate cause of the loss, in order to bring it within the policy. (Angell on Ins., sec. 111-119; Ellis on Ins. (Shaw's Ed.) p. 79 and notes; *Austin v. Drewe*, 6 Taunton, 436; *Babcock v. Mont. Co. Mut. Ins. Co.*, 6 Barb. 637; *Kenniston v. Mer. Co. Mut. Ins. Co.* 14, N. Hamp. 841.) Here it is but the remote cause. It can only be regarded as the proximate cause of those consequences that necessarily result from it.

Thus it has been held that a loss necessarily sustained by the removal of goods from a building in imminent danger from an adjoining fire, was not within the policy. (*Hillier v. Alleghany Co. Mut. Ins. Co.*, 3, Barr, Penn. R. 470.)

And where a part of a cargo insured against perils of the sea was lost by such perils, and in the confusion of the occasion, another part was stolen by the crew, that portion of the loss was held not to be covered by the policy. (*Hicks v. Fitzsimmons*, 1 Wash. C. C. Rep. 279.)

And so a loss incurred from the interruption of business, in consequence of a fire, is not within the insurance. (*Niblo v. North American Fire Ins. Co.*, 1 Sandford, 557.)

And the very point involved in the present case was decided adversely to the plaintiff, in the unreported case of *Wood v. The Brooklyn Fire Ins. Co. and others*, in the General Term of the Supreme Court for the New York district.

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No decision has gone the length of sustaining the claim made in the present case. To construe a fire policy as covering the consequences of the unlawful acts of trespassers upon insured property, merely because the occasion of a fire facilitated the perpetration of the mischief, would be to introduce a novel feature in the law of insurance, and one of very questionable expediency.

The risk of theft is one that every owner of property must run at all times. The law of the land affords the only protection and redress.

II. Evidence that goods had been stolen by firemen at other fires, was not admissible to prove that the plaintiff's goods were stolen on the occasion in question. For the admission of this evidence, a new trial should be granted.

BY THE COURT. DUER, CH. J.—The judge, upon the trial, charged the jury, that, if they were satisfied that the plaintiff had sustained the loss that was claimed, he was entitled to recover, as well for the goods abstracted or stolen, as for those, if any, destroyed by fire. To this part of the charge, the counsel for the defendant excepted; and whether this exception is well taken is the single question that we are now required to determine. In words less technical: Whether, as fire is the only risk mentioned in the policy, the defendants are answerable for the loss of goods that, during the course of, or subsequent to, their removal from the building on fire, and before any part of them had been restored to the possession of the assured, had been abstracted or stolen?

The determination of this question evidently depends upon the true interpretation and just application of the established maxim, that, in determining the character of a loss for which an indemnity is claimed under a contract of insurance, its proximate cause is alone to be regarded; so that, when it appears that this proximate cause was a peril not covered by the policy, the insurers are discharged from all liability. The well-known maxim of Lord Bacon, "*In jure causa proxima, non remota, spectatur*," it is admitted, furnishes, in all cases, the controlling rule. Strictly speaking, the proximate cause is that which immediately precedes and directly occasions a loss; and hence, if the maxim is to be understood in this limited sense, it is plain that the defend-

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ants are not answerable for the loss that is claimed, since its proximate cause, in this sense, was not fire, but theft—a risk which the language of the policy does not embrace, and against which no indemnity in terms is promised.

It is not pretended, however, that the maxim, in its application to the contract of insurance, has ever been understood, or, without an entire disregard of prior decisions, can now be understood, in this strict and limited sense—a sense that, if adopted, would confine the liability of insurers to losses produced solely by the direct agency of a peril insured against, upon the property insured. It is not denied that, in numerous cases, where the property has not been at all injured or affected by direct action of the peril, the insurers have been held responsible for a subsequent loss, even when its immediate cause has been an act or event not mentioned in the policy. Nor is it denied that, in all such cases, the law attributes the loss to the original peril, as its proximate cause. Thus, to select a frequent and familiar instance, where goods insured only against fire, and contained in a building actually on fire, are neither touched by the flames, nor affected by the heat, but are saturated by the water used to extinguish the fire, and are thereby damaged or rendered worthless, it has never been doubted that the insurers are bound by their contract to satisfy the loss; nor that it is recoverable as a loss occasioned by fire, although the voluntary application of water was, in reality, its sole immediate cause. And this single example is sufficient to prove that the maxim, "*causa proxima non remota spectatur*," is not to be strictly and literally construed, but, by its received interpretation, embraces consequential or incidental losses, as well as those which are direct and immediate. To enable us, therefore, to answer the novel question now before us, it will be necessary to define the consequential losses that the maxim by which we must be governed has been held to embrace, and carefully to distinguish them from those, the recovery of which it has been held to preclude. We must ascertain, if possible, the principle or grounds upon which each class of cases may justly be said to rest, that we may determine to which class that which is before us, by a parity of reasoning, ought to be referred; and this we shall now endeavor to do, by referring to a few of the cases belonging to each class.

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There are some losses, not produced by any direct action of a peril insured against upon the property insured, and therefore strictly consequential, which it is admitted by all that the insurers are bound to make good. They are responsible for every loss which is, physically, a necessary consequence of the peril; that is, for every loss that, from the nature of the peril, and of the subject insured, when the peril occurs, must inevitably follow.

The modern case of *Montoya v. The London Assurance Company*, supplies an excellent illustration. (6 Exchq. Rep. 451, S. C. 4 E. Law and Eq. R. 500.)

The insurance was on tobacco, forming part of a cargo consisting of hides and tobacco. The vessel, in stress of weather, shipped a quantity of sea water, by which the hides, upon the top of which the packages of tobacco were stowed, were thoroughly wetted; but the tobacco was never in contact with the water, and sustained no damage directly from that cause. The hides, however, in consequence of the wet, became putrid, and emitted a fetid odor, which pervading the tobacco and destroying its flavor, rendered it unmerchantable, and the Court of Exchequer held that the defendants were bound to satisfy the loss, as a loss from the perils of the sea. Here the effluvia arising from the hides, a risk not mentioned in the policy, was the immediate cause of the damage to the tobacco, but as this was a necessary consequence of the damaged condition of the hides, and, therefore, of the perils of the sea, the entire loss was justly attributed to those perils as its proximate cause.

But although insurers, by force of their contract, are liable for every loss which is a necessary result of a specified peril, it is certain that they are not liable for every loss that may justly be deemed a consequence of such a peril; that is, for every loss that, but for the happening of the peril, would not have occurred. And on the other hand, it is equally certain that their liability is not confined to consequential losses, that may properly be deemed necessary and inevitable.

In the case that I shall first cite, the claim of the assured for a consequential loss was rejected upon the ground that the loss, although consequential, could not justly be attributed to the peril which preceded, as its proximate cause.

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In the case of *Livie v. Janson*, in the King's Bench (12 East Rep. 648), the ship insured, which was "warranted free from American condemnation," was driven ashore by the perils of the sea, and while in that position was seized and condemned by our government; but the vessel, although stranded, might have been got off, so that but for the seizure that followed, a partial loss only would have been sustained. The loss claimed was a total loss from the perils of the sea. The Court, however, held, not only that the partial loss from sea damage was merged in the substantive total loss that followed, but that this total loss was imputable solely to the capture and condemnation, and not to the stranding as a peril of the sea, and consequently that the assured was not entitled to recover. Lord Ellenborough, in delivering his judgment, said, by way of illustration: "If a ship meet with sea-damage which checks her rate of sailing, so that she is taken by an enemy, from whom she would otherwise have escaped, though but for the sea-damage she would have arrived safe, the loss is to be ascribed to the capture, and not to the sea-damage, upon the principle that '*causa proxima non remota spectatur*.'"

In the case of *Rice v. Homer* (12 Massachusetts Rep. 280), this decision was followed by the Supreme Court of Massachusetts, and the loss of a vessel which was captured, after being damaged by the perils of the sea, was imputed to the capture as its proximate cause; and as, by the terms of the policy, the insurers were exempted from a loss by capture, it was held that the assured were not entitled to recover.

In an early case in our own Supreme Court (*Patrick v. Com. Insurance Co.*, 11 Johnson Rep. 14), the insurance was on the cargo of the ship *Thomas Jefferson*, and the policy contained a clause, exempting the insurers from "any risk in port but sea-risk." The ship, with the cargo insured on board, was in the bay of Cadiz, which was then besieged by the French, and in a violent storm she broke from her moorings, and was driven on shore; and after remaining in that situation for some days, some French soldiers came on board and destroyed by fire, both vessel and cargo. The Judge, upon the trial, submitted to the jury the question whether the loss was occasioned by sea risk, and the jury found a verdict for the plaintiff for a total loss. The Court,

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however, set aside this verdict, as contrary to law and evidence, and in delivering their judgment, KENT, Chief-Justice, said that "as the cargo was not injured by the stranding, and no effort to remove it was made, and as the means of removing it from the vessel across the bay of Cadiz to the city might easily have been procured, it was evident that the loss of the cargo must be imputed wholly to the act of the French. The stranding, undoubtedly, led to this unhappy result, but that the Court must place the loss to this result, and not to the stranding, upon the maxim that '*causa proxima non remota spectatur*.'"

The insurance in the case of *Hillier v. The Alleghany County Mutual Insurance Company*, in the Supreme Court of Pennsylvania (8 Barr. Rep. 470), was upon goods against fire, and the loss claimed was for the damage which the goods had suffered in the course of their removal from the building in which they were stored. This building was not on fire, but was very near to another which the flames had seized, and the removal of the goods was judged to be necessary to their preservation. The Court held that as the fire did not reach the building in which the goods were contained, and the goods, but for their unnecessary removal, would not have been injured, the insurers were not responsible for a loss which was occasioned merely by an apprehension of the peril insured against, and not by the peril itself.

My observation upon the cases that have been cited, is: that it cannot be denied that in each of them the loss for which an indemnity was claimed, was, in one sense, a consequence of the peril insured against, since in each it was certain that but for the happening of the peril—the sea peril in the first case, the fire in the last—no loss, or a loss only partial, would have occurred; but as in each case the property insured would have been saved, in whole, or in part, but for the happening of a subsequent event of risk, this subsequent risk, as it was the only efficient, was properly held to be the proximate cause of the loss, and as it was not covered by the terms of the policy, the insurers were, necessarily, discharged from its payment. In each case, the peril insured against was merely the occasion, and not in any legal sense, the cause of loss.

From these, therefore, and many other cases in which the

insurers have been exonerated from consequential losses, it may be safely deduced, as a general rule, that insurers, whether on a marine or fire policy, are never liable for consequential losses, other than such as are physically or legally necessary, unless it appears not only that the property insured was involved in a peril insured against, but that it must have perished from that cause, had the peril continued to operate. In fewer words, unless it appears that the loss, had it not been consequential, would have been immediate and total.

When this necessary condition of the liability of the insurers is proved to have existed, the consequential losses for which they have been held to be answerable, may be divided into two classes; and if the loss now claimed can with propriety be referred to either of these classes, the plaintiff will be entitled to our judgment; otherwise, the verdict in his favor must be set aside and a new trial be granted.

First: The insurer must satisfy every loss which is shown to have been, although not a necessary, a natural consequence of the peril insured against; and by natural is evidently meant a usual and probable consequence, and such, therefore, as it is reasonable to believe was in the contemplation of the parties when the insurance was effected. Hence, the insurers are bound to indemnify the assured against every loss that may be expected to follow from the means usually employed to avert or diminish the peril, and save the property insured from the destruction, in which it would otherwise be involved; and it can hardly be said that their liability for consequential losses that may with certainty be referred to this class, has ever been doubted or denied.

The examples that most readily occur, are, under a marine policy, jettison of goods, or the cutting away of a mast during a storm; and, under a fire, the damage to the goods from water, and the injuries which they suffer from haste and negligence in the course of their removal from a building actually on fire.

The second class of consequential losses for which the insurers are undoubtedly liable, as referable to the peril insured against as their proximate cause, embraces the cases in which the property insured is extricated from the peril that otherwise would have led to its destruction, by means that could not have been anticipated by the parties, but by which it is taken from and

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never again restored to the possession of the assured, so that to him the loss is exactly the same that it would have been had the peril continued to operate.

The case of *Brondrett v. Hentigg* (1 Holt N. P. Rep. 149, 2 Arnould on Insu. 1005) was cited by the counsel for the plaintiff, as an example of this class of consequential losses. The vessel containing the goods was wrecked on the coast of the Isle of France, and the goods were plundered by the natives on shore, and Sir Vicary Gibbs held, that the loss was a consequence of the wreck, and, therefore, recoverable as a loss by the perils of the sea. He said that no abandonment was necessary, since the goods which were saved from the wreck, though got on shore, never came again into the hands of the owners. As to them, therefore, the loss was total.

This, although a *Nisi Prius* decision, is cited with approbation by the text writers, but the cases to which I shall next refer were decided by the Court in term, and not only carry with them a greater weight of authority, but are more closely applicable to the question before us.

The first is *Hahn v. Corbett*. (2 Bingham Rep. 205.) The loss claimed was upon goods insured on a voyage from London to Maracaibo, which, by a clause in the policy, were warranted "free from capture and seizure." The ship containing the goods, when she had nearly reached her port of destination, was driven in a storm upon a sandbank, and totally disabled, and while thus situated, the goods that otherwise would have perished from the peril in which they were involved, were seized and carried on shore by Spanish Royalists, who had shortly before recovered the possession of the town and port of Maracaibo. The assured, notwithstanding the warranty in the policy against seizure, claimed that they were entitled to recover a total loss, upon the ground that the seizure, although the immediate cause of the loss, was itself a consequence of the stranding and wreck of the vessel, and that the loss ought, therefore, to be attributed to the perils of the sea as its proximate cause. The Court sustained the claim of the assured, and held that the loss was properly described in the declaration as a loss by the perils of the sea, since it was certain that those perils were its main conducting cause. It was by their agency (it was said) that the ship was reduced to a wreck, and it

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was by the same agency that the goods, had they not been seized, would have been destroyed. And in reading the opinion of the Judges, it is manifest that the certain destruction of the goods by the perils insured against, had they not been seized, was the main ground of the decision. It was for this reason alone that those perils were held to be the proximate cause of the loss. Indeed, the only distinction that can be stated between this case and those of *Livie v. Janson*, and *Patrick v. The Com. Ins. Co.*, before cited, consists in the fact, that in those the property insured, but for a subsequent event, might have been saved, while in this it must have been destroyed, had the peril continued to operate.

The most recent case that I have found was decided by the present Court of Queen's Bench, and in its material circumstances, it not only bears a close analogy to the present, but furnishes a satisfactory answer to an argument that was much insisted on by one of the learned counsel for the defendants, namely, that the goods upon which the loss is claimed, were not only saved from the peril insured against, but in judgment of law never ceased to be in the possession of the plaintiff.

Dean and another v. Hornby (23 L. Journ. R. N. S. 129; 24 Law and Eq. Rep. 85), is the case to which I refer. The insurance was a time policy upon a ship which, during the continuance of the risk, was seized by pirates in the straits of Magellan, but was recaptured by an English ship of war, and taken to Valparaiso. At Valparaiso, a prize master and crew were put on board, and the ship was sent to England for adjudication in the Court of Admiralty. It was while the ship was in the prosecution of this voyage that the plaintiffs abandoned to the underwriters, and it was agreed that their right to recover a total loss was to be determined by the facts that existed at the time of the abandonment. It is needless, therefore, to take any notice of those that subsequently occurred.

It was insisted, on the part of the defendants, that there was no total loss when notice of abandonment was given. That although there was constructive total loss when the ship was seized by the pirates, the property was not changed by the seizure, and, upon the recapture, remained in the owners, and that the recaptors, although they had a lien to the extent of the salvage to which they were entitled, yet, subject to that lien, held

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possession for the owners. Consequently, so far from there being a total loss, both the property and the possession of the ship were in the assured when they abandoned. Lord Campbell and his brethren were, however, of a different opinion. They held that the constructive total loss created by the piratical seizure, at the time of the abandonment, had not ceased to exist, since, although the ship before that time had been recaptured, yet, the possession had not been restored to the assured, nor had they then the means of obtaining the possession. It was true, the property remained in them, but the recaptors had the sole possession and control. Judgment for a total loss was, therefore, given for the plaintiffs.

The principle of this decision evidently is, that when circumstances, that by their continuance, would create a total loss, have once existed, the loss continues total, although those circumstances may have wholly changed, so long as the property is not beneficially restored to the possession of the assured.

I have already said, that although the loss now claimed is consequential, yet if it fall within either of the classes that have now been stated and explained, it is recoverable under the policy, as a loss by fire, and that it falls within both classes, is the conclusion to which we have all of us come, with the exception of my brother Hoffman. We think that this conclusion is fully justified by the decisions to which I have referred, and which we are not aware are contradicted or shaken by any other authorities.

It cannot be denied, that the facts which I have stated to be the necessary condition of the liability of insurers for consequential losses, other than such as are inevitable, were in this case proved to exist. The goods were removed from a building actually on fire, and which was destroyed by the fire; had they remained, their destruction was certain. Under these circumstances we think the loss as claimed was a natural consequence of the peril insured against. When the doors of a warehouse or store on fire, are broken or thrown open, in order that the goods within, by their removal, may be saved from the peril, a loss of a portion of them by plunder we cannot but think is just as certainly a natural consequence of the attempt to preserve them, as the damage which they suffer from the negligence or recklessness

of those engaged in their removal. It is a consequence that from the frequency of its occurrence, may be expected to follow, and which, it is therefore reasonable to believe, was in the contemplation of the parties when they made their contract. It is a public and notorious fact, which as such we may judicially notice, that in this city, and, indeed, in all crowded cities, losses from this cause constantly happen, and that from the temptation and facilities that a fire creates, it would be difficult and almost impossible to prevent them. And when we call to mind the hurry, confusion, and disorder that usually prevail, and the habits and character of those who form a large portion of the crowd that usually assemble at a fire, it would be a matter of great surprise if losses of this description were not as frequent as an experience almost daily attests they are.

It was admitted by one of the learned counsel of the defendants, that as petty losses by theft not unfrequently happen, it might not be unreasonable to hold that, for such the insurers are liable, as a natural consequence of the peril insured against; but he contended that, as a loss by theft of the magnitude of that which is now claimed, very rarely occurs, it would be unjust to hold that the defendants ever meant to assume the risk, since it cannot be thought that such a loss was in the contemplation of the parties when they made the contract.

The argument is plausible, but it implies a distinction for which there is no warrant or precedent, and to which we cannot assent. The only question is, whether a loss by theft is from its nature a consequential loss, for which the insurers are liable, and if this be admitted or proved, their obligation to satisfy the loss, when not exceeding the sum insured, cannot be varied by its amount.

If all the costly furniture of a dwelling-house were defaced and broken by a disorderly crowd volunteering their aid to rescue it from a fire, we cannot believe that the unusual amount of the loss would be held to exonerate the insurers from its payment. And we see no reason to doubt that a loss by theft, if covered by the policy at all, stands upon the same ground.

But were we prepared to say, that, if the loss now claimed cannot be regarded as a natural consequence of the peril, and is not recoverable upon that ground, it is still certain, that the goods

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upon which it is claimed, before their removal, were involved in a peril that must have led to their destruction, and that, although saved from this peril, they were never restored to the possession of the plaintiff. Hence, unless the cases of *Brondrett v. Hentigg*, *Hahn v. Corbett*, and *Dean v. Hornby* are to be cast aside, or it can be shown that there is a valid distinction between those cases and the present, the plaintiff must be entitled to recover.

We think that these cases were rightly decided, and, although varying in circumstances, in principle are not to be distinguished from the present.

It is true that a valid distinction has been supposed to exist. It has been said, that in each of those cases there was an actual total loss by the perils of the sea, that never ceased to exist, and that its continued existence was in each case the ground of the decision; while in the case before us there was no such loss of the stolen goods before their removal.

But the supposition upon which this argument proceeds, it appears to us, involves a mistake, both of the law and the facts. In neither of the cases referred to was the original loss that is spoken of actually total. It was so only by construction of law. The loss of goods on board a shipwrecked vessel, so long as they subsist in specie, is not actually total. The certainty of their destruction by the perils of the sea, if they remain in that situation, it is true, gives to the assured a right to abandon; but, as Mr. Phillips has justly observed, (1 Phillips, 649), this is a right that the assured is not bound to exercise, and it is only by its exercise before the goods are rescued from the peril and restored to his possession that the loss is rendered total. If the goods are landed, and come again into his possession, or that of his agents, and, at a reasonable expense, may be transported to their port of destination, the right to abandon and claim a total loss is wholly gone, and a partial loss only is recoverable. It seems to us manifest, therefore, that the true grounds of the decision in *Hahn v. Corbett* (the case that bears the nearest resemblance to the present) were exactly those that have been stated—the certainty that the cargo of the stranded vessel would have been destroyed by the perils of the sea, had it not been seized by the Spanish Royalists, and the fact that after the seizure it never came again into the possession of the assured. So here, it is cer-

tain that the goods upon which the loss is claimed, had they remained in the store, must have been destroyed by the fire; and equally so, that, since their removal they have never been restored to the possession of the plaintiff,—the loss to him is exactly the same as if they had been consumed by the fire. So far as he is concerned, they were never rescued from the peril in which they were involved, and which may, therefore, be justly considered the proximate cause of the loss.

There is no ground for the allegation that the goods lost were in the possession of the plaintiff when the loss happened. They were taken from his possession by the persons who removed them, and those persons were in no sense his agents, or subject in any respect to his direction or control. Neither he nor any person acting by his authority was present at the fire. The case, moreover, expressly states that the goods saved were taken possession of by an agent of the insurers, who stored them in a building of which he kept the key; and that this key was not delivered to the plaintiff until the next morning. Until then the goods saved were not restored to his possession. Those that were stolen were at no time after their removal in his possession. The property remained in him, but the possession was gone. (*Dean v. Hornby*, *supra*.)

The result of this discussion is, that, in our opinion, the jury were rightly instructed upon the trial, and that the plaintiff is entitled to judgment upon the verdict which they rendered, and such is our decision.

An important case was cited upon the argument, (*Levy v. Baillie and others*, 7 Bingham, Rep. 349) that hitherto I have omitted to notice; and I refer to it now, not as a positive decision, (which it is not), but as evidence satisfactory, if not conclusive, that in England consequential losses of the character of that which is now claimed, are deemed to be recoverable under a policy in which fire is the only risk insured against, and are treated as losses which in judgment of law are occasioned by fire. In this case, nearly the whole loss that was claimed was alleged to have resulted from the plunder of the goods insured, by the crowd assembled at the fire. It was denied by the defendants that any such loss had occurred, and the fact was very doubtful upon the evidence; but it was not denied that, if the

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loss were proved, the defendants, as insurers against fire, were liable for its payment; nor was any doubt as to their liability expressed or intimated, either by the counsel for the defendants or by any of the judges. It is true, the question was not raised; but as from its nature it could not have escaped the attention of the parties, we may be certain that it would have been raised, had not the defendants and their counsel been satisfied that it was fully settled by law and usage in favor of the plaintiff.

Finally. It is certainly not a matter of regret, that a careful examination of the authorities has led us to the conclusion that the defendants are responsible, as insurers against fire, for the loss that is claimed. It seems to me that a denial of their liability for such a loss is most unwise; and I am persuaded that it is for the interest alike of the public, of the assured, and of the insurance companies themselves, that the defence should be overruled.

HOFFMAN, JUSTICE, dissenting.

The first, and very important question is, as to the liability of the Company for goods assumed to have been stolen during the fire.

The question is thus presented: The judge at the trial, after commenting upon the leading points of the testimony, observed, that the statements of the witnesses could only be reconciled upon the supposition that a portion of the goods were abstracted during the fire. That it was in his opinion a serious and a doubtful question, whether insurers, insuring against fire alone, are bound to make good any loss arising from stealing the goods by persons at the fire. But for the purpose of the trial, he should charge that it was immaterial, whether the goods were actually burned, or were abstracted or stolen by persons at the fire.

The counsel for the defendants excepted to that part of the charge in which the jury were told that the defendants were liable for goods stolen at the fire. The jury found a verdict for the plaintiffs, which was directed to be entered, subject to the opinion of the court at general term, as to the liability of the defendants for goods stolen.

The question on this bill of exceptions is presented coupled

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with the following facts: The policy was the ordinary fire policy, insuring the plaintiff "against all such loss and damage as should happen by fire to the property specified, from the 1st of June, 1853, to the 1st of June, 1854." There was the usual clause of exemption from fire happening by means of invasion, insurrection, &c.

The goods were removed when they would have been destroyed had they been suffered to remain, the store in which they were being entirely consumed. The fire originated in an adjoining building.

The proposition involved in the charge will comprise the case of goods stolen after they had been all safely removed from the store, and were in the street, as well as the case of a theft while they were yet in the store. In the opinion of one of my brethren, a distinction exists between such cases, and he supposes that the underwriters are liable in the first, but probably not so in the second case. I do not myself think that any solid distinction exists; but if it does, the charge is exceptionable in this view as embracing the first case.

To test, then, the legal proposition in its latitude, it is to be assumed that the goods were stolen in the course of removal from the place of the fire to the Sun Buildings, where they were stored during the night, and from which they were delivered to the plaintiff the next morning.

The contract is to indemnify the assured from a loss or damage arising from fire. A loss resulting from theft presents a different cause of injury, and is not literally within the contract of indemnity.

The theft, then, was the immediate producing cause; the fire was a cause of that cause, but was not the direct agent in the loss.

Now, the tendency of the law of insurance, both marine and fire, has been to determine all cases of a similar nature by a reference to the direct proximate cause. The common maxim is, *causa proxima non remota spectatur*. Lord Bacon was its author, or at least its great interpreter. It is needless to repeat his well known philosophic explanation. It is of more importance to deduce from authorities the extent and practical application of the rule.

In marine policies covering a loss by fire, it is no defence that

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it was caused by negligence, unless there was barratrous conduct in the strict sense of the English law. (Phillips on Insurance, vol. 1, art. 1,096, citing numerous authorities.)

So in the case of fire policies, it is settled, that insurers are responsible for loss by fire, though occasioned by the neglect of the assured, or of their agent, short of actual designed fraud. (*Columbia Insurance Co. v. Laurence*, 10 Peters' Rep. 507; *Gates v. Madison Insurance Co.*, 1 Selden R. 469; *St. John v. The American Insurance Co.*, 1 Duer Rep. 371.)

In all cases of this character, the fire is found to be the proximate and efficient cause. The court, finding this, stops there, and will not go further in the chain of causes, except in some special cases. In special cases we find an inquiry made into antecedent causes. The question is, when will such a preceding cause control the decision of the particular case?

I think I am warranted in saying, that if the proximate cause is within the policy, the insurers will not be exonerated by proof of a preceding cause not within it, however plainly it led to the result. And again, if the proximate cause is not within the policy, the insurers will not be held liable, although a preceding cause is within it, and tended to produce the loss.

I state this proposition as the general rule. It is undeniable that there are cases in which a damage springing directly from a cause not covered, is yet to be attributed to a peril which is covered. These are exceptional cases; and it is of the highest importance to remember that they are so, and that the other is the rule.

If I mistake not, these two propositions will be found more consistent with the great mass of authorities than any other.

Thus the case of the *General Mutual Insurance Co. v. Sherwood*, (14 Howard U. S. Rep. 351,) involves the following points: A damage from collision with another vessel can be charged to underwriters, though caused by the mariner's neglect. It is a peril of the sea. But damages paid to the other vessel, under a sentence in Admiralty, are not chargeable. The condemnation is the proximate cause. That is not insured against. It is traceable to neglect. That cannot of itself confer a right of action, although it will not absolve from a liability once fixed by the terms of the contract.

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In *Levi v. James*, (11 East. R. 648,) the policy was against the perils of the sea, in the ordinary form, and there was a warranty against condemnation. The vessel was driven by the wind and ice upon the American coast, and was seized and condemned. The underwriters were discharged. The immediate cause of the loss was the condemnation.

In *St. John v. The American Insurance Co.*, (1 Duer Rep. 871,) the policy was against fire, with a clause that the Company would not be responsible for any loss occasioned by the explosion of a steam boiler, or explosions arising from any other cause. A steam boiler used on the premises exploded. The fire in the furnace and stoves in consequence communicated with the timbers and wood work, and the building was destroyed. The insurers were discharged.

Now, although the explosion and fire were nearly simultaneous, it is physically certain that some space of time must have intervened between them. The fire was strictly the immediate cause, but the explosion was so entirely the actual and efficient cause, as clearly to create an exceptional case.

In *Waters v. The Merchants' Insurance Co.* (11 Peters' Rep. 213,) one point decided was, that a loss by fire caused with a barratrous intention by the master and crew, was not a loss by fire, but one by barratry; and as the policy did not insure against barratry, the insurers were not liable. Justice Story says, the barratry concurs with the element, *eo instanti*, when the injury is produced. Holed holed barratrously, by which the vessel is filled with water, is not a loss by a peril of the sea, but by barratry.

Another point determined was that in a marine, as well as a fire policy, a loss by fire falls upon the insurers, although caused by negligence. And lastly, that if a fire causes an explosion, the fire is the actual and proximate cause of the loss.

It may be observed, that in these cases and examples, we cannot separate the immediate agency of the loss, from the producing cause of that agency. The act of applying a torch, or strewing powder, with a view to blowing up the vessel, is not in strictness the ignition of the vessel; yet the design and operation of it are one act.

Gobay v. Lloyd (3 Barn. & Cres. Rep. 793), was the case of an insurance upon horses warranted free from mortality and jetti-

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son. In consequence of a storm they broke down the partition between them, and kicked and injured each other, so that some of them died. The loss was held to have arisen from a peril of the sea.

Laurence v. Aberdeen (5 Bar. & Ald. Rep. 107), was upon a policy containing the same clause as to mules. In consequence of the heavy pitching of the vessel in a storm, some of them were killed. The insurers were held liable. The word mortality, meant death from natural causes, not from violence.

In *Totham v. Hodson* (6 T. R. 655), slaves died from want of provisions, but this was caused by the ship being driven from her course by tempests. A statute (21 Geo. 3), had enacted that no loss or damage should be recoverable on account of the mortality of slaves by natural death, or ill-treatment, or throwing overboard. The underwriters were held not liable. But Chief-Justice ABBOTT, adverting to this case in *Laurence v. Aberdeen*, states, that this was because of the provision of the statute. Otherwise the underwriters would have been responsible.

Montoya v. The London Assurance Company (6 Excheq. Rep. 451), a vessel laden with hides and tobacco, shipped sea-water, which rendered the hides putrid, and thus imparted an ill flavor to the tobacco, and injured it. Held to be a damage from the perils of the sea.

There is also the case of *Hahn v. Corbett* (2 Bing. Rep. 205). The insurance was upon goods in a ship warranted free from capture. The ship was stranded on a shoal within a few miles of her port of destination, disabled from proceeding, and lost. While lying on the sand she was seized by the commander at the place where she was stranded, and confiscated. It was held to be a loss by the perils of the sea. The place had been taken by the Spanish force, shortly before the arrival. Some goods were taken out undamaged, but the bulk was greatly injured.

This case is certainly open to the remark, that the loss had happened, and was absolute, by reason of a peril insured against. The insurers' liability was fixed. Could a new event displace that liability? The enemy profited by the calamity which was insured against. In short, upon the principle of the Court there was a total loss consummated, before the capture to which the loss was sought to be attributed. BEST, C. J., says: "It has

been asked, when can the goods be said to have been totally lost? The answer is, when the ship was totally lost."

But how is it here? The removal was an act for the purpose of preserving the goods to the owners, not to rob such owners of them. In fact, they were rescued from the peril insured against, when they met that not insured against.

The case of *Dean v. Hornby* (24 Eng. L. & Eq. Rep. 85) is a striking illustration of the principle of this case. A ship was insured for one year. During the time, she was taken by pirates. She was subsequently rescued, but never came to the possession of the owners, nor had they the means of ever getting possession. The principle is, if there is once a total loss by a peril insured against, it will continue to be such, unless something afterwards occurs by which the assured gets, or has the opportunity of getting, the property back to him.

So, in the case put by Mr. Justice STORY, in *Maguire v. The New England Company* (1 Story Rep. 164) of a capture insured against, and before the vessel is delivered from that peril, she is lost by fire or accident, or negligence of the captors. The loss shall be attributed to the capture.

In that case the vessel was insured against loss by capture or seizure. But during the detention she became injured to the amount of a total loss. The insurers were held liable. The capture had perfected the loss. The vessel had not escaped from that peril until the injury had become irremediable.

Brondrett v. Hentigg (1 Holt Rep. 149) may be treated as a case of the same class. The policy was on goods from London to the Isle of France, and covered losses from the perils of the sea. The ship was wrecked, but some of the cargo was landed. The natives destroyed part, and plundered the rest. Chief-Justice GIBBS said: "The cause of the loss was the perils of the sea. The goods got on shore never came to the hands of the owners. An abandonment was not necessary."

The French writers support this case. Emerigon and Pothier declare, that the loss of goods by pillage, after a vessel has been wrecked upon a shore, is to be borne by the insurers. Shipwreck opens the insurance. The property becomes that of the insurers. *Res perit domino*. (*Pothier Traité des Assurances*, No. 55; *Emerigon*, ch. 12, § 29.)

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It is stated as a general rule, by the French elementary writers, that the insurers in a land policy (*assurance terrestre*) are not bound to pay more than the loss which is caused immediately and directly by the fire; not for a loss, for example, arising from any suspension of business, or during the making of repairs. (*Arret de Com., Paris, Ap. 26, 1858; De Villeneuve, 1, p. 210, Art. 101.*—Astor Library.)

When, then, we find a peril actually insured against is the efficient direct cause of a loss, certainly it would be strange to hold, that an occurrence the mere consequence of such peril should vary the liability. But the distinction seems to me a broad one, when the peril actually insured against has not directly affected the property, but its consequence—an injury not within the policy, is to be the ground of responsibility.

Levy v. Baillie (7 Bingham Rep. 349) was cited and relied upon by the counsel for the plaintiff. The action was on a fire policy, with a clause requiring the assured to give a full and true account of the damage or loss, by affidavit or affirmation. In case of fraud, or false swearing, the policy to be void. The insurance was for £1,000. The plaintiff swore to a loss of £1,085, viz. £85 for goods injured in the process of removal, and £1,000 for goods abstracted by the crowd and never recovered. The goods were, bedsteads, tables, chairs, carpets, &c. The defence was, fraud in the valuation; that it was impossible goods so bulky and numerous could have been carried off undetected. The witnesses testified that policemen were on the spot, and a cordon was formed almost immediately after the fire broke out; and that the fire was over in two hours, and that no article of bulk could have been carried away. The plaintiff's witnesses denied that the blockade had been effectual. The Chief-Justice left it to the jury to say whether the claim was fraudulent. They found for the plaintiff, and with £500 damages.

The defendants obtained a rule for a new trial, on the ground that such a verdict did, in fact, establish the fraud in the demand and also that the verdict was against evidence. It was resisted, on the ground, that there might have been a mistake in the estimate of the goods lost, and that the evidence was conflicting as to the probability of loss.

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The Court, on consultation, made the rule absolute for a new trial.

Undoubtedly this case is open to the remark, that the point of a freedom from liability for goods stolen was not made when it would have been decisive. The granting of the rule was, however, manifestly warranted by the great disproportion between the sworn valuation and the verdict, proving a case of fraud.

There is a line of cases in which the maxim in question is qualified, and exceptions permitted upon the ground of fraud or neglect, which was the producing cause of the immediate agency of the loss. It is sufficient for me to refer to the late case of *Thompson v. Hopper* (Queen's Bench, Jan. 1857, Law Jour. Rep., vol. 26, p. 18). Lord Campbell cited several cases to illustrate the proposition that the maxim of Lord Bacon was qualified by another: *dolus circumitus non purgatur*. Among them is *Waters v. The Merchants' Ins. Co.* (11 Peters, U. S. Rep. 213), before noticed, and *Davis v. Garbett* (6 Bing. N. C. 747). Tindal, Chief Justice, there said: "The maxim relied upon can never be applied, when it contravenes the fundamental rule of insurance: that the assurers are not liable for a loss occasioned by the wrongful act of the assured. For this purpose the misconduct need not be the *causa causans*. If it be the efficient cause of the loss, it is enough." *Bell v. Carstairs* (14 East Rep. 874) was also cited and relied upon. A vessel was condemned, and condemnation was insured against. But the condemnation was for not having such papers as a neutral ought to have had. The Court held, the plaintiff's own neglect and fault disabled him from recovering.

In this case Lord Campbell wanders, with the propensity and keenness of his country's intellect, into the metaphysical distinction between *causa causans* and *causa sine qua non*. Indeed, if we take one step in that direction, we may soon be lost in the mazes which led one of his able countrymen to say, "that the word '*cause*' has been so changed, and given so many different meanings, in the writings of philosophers, and in the discourse of the vulgar, that its original and proper meaning is lost in the crowd."—Reid's Philos. Human Mind, p. 461.

There are some cases in our sister States which bear closely upon the present question, and which I proceed to notice.

In *Hillier v. The Alleghany Co.* (3 Barr's Penns. Rep., p. 470),

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the insurance was against fire. Adjoining buildings were on fire; but neither the goods in question, nor the building which contained them, were touched by the flames. The goods were removed under a reasonable apprehension that the fire would reach the premises, and were damaged in the removal. It was held not to be a loss within the policy.

Mr. Justice Grier, in the Court below, may be considered as conceding, that if the building which contained goods was on fire, and they were injured by the water used in extinguishing the flames, or by breakage on a removal, the insurers, under a liberal construction of the policy, would be answerable. But here the fire was the remote cause of the injury. Chief Justice Gibbs, in the Court above, said: "Insurers are answerable for direct and immediate, not for consequential and remote, losses from a peril insured against. When that is fire, the instrument of destruction must be fire. The proximate cause determines the character of the loss. On this principle the insurers were held liable for the Dutch ship burnt by the Spaniards, in consequence of the apprehension that the crew was infected by the plague. But the converse of the rule, which charges the insurers with a loss of which the particular peril is the proximate cause, exempts them where it is the remote one."

But in *Babcock v. The Mont. Ins. Co.* (6 Barbour's Rep., p. 640), Justice Pratt says: "Goods injured by being removed, to save them from a fire, or by water thrown to extinguish it, are within the provisions of the policy."

Case v. The Hartford Ins. Co. (18 Illinois Rep., p. 676): policy on goods in a brick store, No. 88 Lake street, Chicago. By the policy the Company was to be liable for all such immediate loss or damage as should happen by fire from October the 6th, 1849, to October the 6th, 1850. In case of fire, the insured were to use all possible diligence in saving the property, and the Company was not to be responsible if they failed in that respect.

A building immediately adjoining the premises took fire, and the flames threatened the store with imminent danger. Water was thrown upon it, and came down in considerable quantities. The doors were thrown open by the orders of the Fire Department, which were soon, however, countermanded. Some of the goods were injured by smoke and water, and most of them

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removed across the street to other buildings, about the time the store doors were thrown open. The damage by smoke and water was fixed by appraisalment. The Court, at the trial, refused evidence tending to show a loss arising from the removal of the goods. It was insisted that the policy protected only against immediate loss or damage by fire, and there could be none without ignition. *Austin v. Drew* (6 Taunton R. 436; 4 Campbell, p. 360), was carefully examined.

The Court says: "The circumstances, as they existed at the time the removal was made, must determine the necessity for it; and whatever loss or damage the plaintiff necessarily sustained by the removal of the property insured, when the danger of its destruction by fire was so direct and immediate, that a failure to have made the removal, while the party had the power, would have been gross negligence, he is entitled to recover." An objection was made that damages caused by a removal could not be recovered, under a count, for a loss by fire; but this was overruled.

This was a decision of the majority of the Court, the Chief Justice dissenting. The goods had been removed by the assured; and the Court say, "that they might have been so carelessly removed, and so wantonly exposed, as to relieve the insurers from any liability."

With respect to this case it may be observed, that damages attending a removal—that is, from the breakage or injury directly brought upon the articles—is an ordinary incident to a fire. It may necessarily be anticipated, in every case, of nearly all descriptions of goods, and may reasonably be considered as entering into the contract. It is like the damage from water, thrown upon goods which have taken fire, or are nearly exposed to it.

In *Webb v. The Protectors Insurance Company* (14 Missouri Rep. 3), there was an exception in a fire policy, exempting the Company from any liability for theft. The Court, in its opinion, says, that if there had not been such a clause the Company would have been liable for losses by theft during a fire—the assured not being guilty of any negligence. There was the same clause as to using diligence, which was in the policy in the Illinois case.

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These are all the authorities which I have found in any way bearing upon the question. It cannot be said that they either decide or contain any rule which, by just inference, decides the present case.

I do not deny that there are losses resulting from a peril insured against, but not its direct effect, which are covered by a policy. A vessel is driven by tempest on an enemy's coast, and the goods are seized. It is a loss by the perils of the sea, although the pillage is the immediate agent of the loss. Goods are injured by water poured upon them to extinguish a fire, or to prevent its seizing them. Goods are damaged by the act of removal to get them beyond the reach of flames which would otherwise consume them. It is apparent that in each of these cases, Baron Pollock's test is applicable. The actual injury "is a natural and almost inevitable consequence of the occurrence of the peril actually insured against" (6 Exchq. Rep. 458). But it seems to me there is a satisfactory, if not a broad distinction, between such cases and the present. They do not merely depend upon the fact that such damage is immediately and necessarily the consequence of a fire; but upon this, that they are so invariably and inevitably such a consequence, that it is almost impossible to suppose they did not enter into the contemplation of the parties when they made their contract.

In a strict and logical sense, no one would contend that theft was the natural effect of a fire. In the sense of a common and anticipated result, it would be so in a large city, and scarcely at all so in a small well-ordered village. The latitude and force of the contract might thus fluctuate with the numbers and honesty of each locality. Still less can I consider such a result as inevitable. The extent of precautions, the bulk or size of the articles exposed, the period of exposure, are all circumstances to render the depredation more or less probable under the worst of circumstances, and in some cases to render it nearly impossible.

I cannot free my mind from the consideration that the insurers have entered into an express contract, by which they have assumed to pay a loss happening by fire, and have not engaged to be responsible for theft. It is incumbent, then, upon the assured to prove that a loss from this cause was so plain and necessary a consequence from a fire, as that the parties must have

intended to comprise it in the contract. I cannot deduce such a consequence upon any line of satisfactory reasoning, and I do not find authority enough to make it a rule of law. It is not a loss of a similar nature. It is not a loss the necessary, or almost necessary result of a fire, or of an attempt to preserve the goods. It is not a loss essentially, invariably, or almost invariably, connected with the usual measures of protection. It is distinct, remote, and inconsequential.

I am indisposed, for my own part, to extend the engagement of insurers beyond what is palpably involved in their contracts, or has been decided to be so. In proportion as their responsibility is expanded by construction, an encouragement is given to recklessness, and the opportunity is enlarged for fraud.

II.—There is another point in the case, which requires consideration. The goods were removed by the ordinary watch, and by what is called the insurance watch. These persons, with the police, removed the goods, formed the lines, and deposited the property in the neighboring store. On the ensuing morning the insurers gave notice to the plaintiffs that the goods were there, and sent them the key.

In connection with this evidence, we may refer to the sixth condition of the policy. It provides "that in case of fire, or of loss or damage thereby, it shall be the duty of the insured to use their best endeavors for securing and preserving the property; and if they should fail to do so, this company will not be answerable for the loss and damage sustained in consequence of such neglect."

It at first appeared to me unreasonable, that such a covenant should be considered as fulfilled, if the plaintiff used proper efforts, when actually, and only when actually present at a fire. It struck me it was incumbent on him to use some precautions to ensure the intelligence of a fire being given to him.

While further consideration has led me to vary this view, it has also induced me to consider that under the duty imposed by the condition, the general fire watch, police, firemen, and insurance watch, may be treated as agents of the plaintiff for protecting the property.

Thus then the interest, or actual employment by the insurers, concurs with the fair import of the stipulation of the assured, to

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constitute these different persons agents of both parties for securing the property.

This view meets the suggestion, that the defendants had taken the sole control of the property, and must on that account be responsible. The proposition of the defendants is, that the goods could not have been stolen, and the alternative is, they were overvalued; and the position is, that they could not have been stolen, because of the entire sufficiency of the measures to guard them from it.

It then occurs that, whether these measures were sufficient, is an important question of fact.

The view I have taken of this part of the case, is this: if theft is to be deemed by construction within the policy at all, yet the underwriters may be discharged, if the assured were guilty of gross negligence. Certainly on the theory of agency and the testimony, that could not be found. Again, if theft is not within the scope of the policy, yet the defendants might have made themselves liable, by an unwarranted exclusive assumption of possession and control. This also clearly could not be found.

My conclusion is, that the charge of the judge was wrong, and that there must be a new trial.

A. SPEIRS BROWN, Plaintiff and Respondent, v. RICHARDSON,
Appellant.

In an action upon a note, by which the makers promise to pay to a third person or order, a sum named, in merchandise, a complaint, which alleges the making and endorsement of the note to the plaintiff, and that the plaintiff "is the lawful owner and holder of it," is sufficient, on these allegations being put at issue, to admit evidence of an actual sale and delivery of the note to the plaintiff. The examination, by the plaintiff, of his assignor of the cause of action, does not, as the code read in October, 1855, authorize a defendant to be examined in his own behalf, except as to the same matter.

Held, that as he offered himself, as a witness, "generally on his own behalf," and as the offer was understood and treated by the Court and counsel as an offer to examine him on matters, as to which the assignor had not been examined, or not at all, the offer was properly excluded. On an appeal from a judgment in an

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action tried before a jury, the action will not be examined, as to its general merits, upon the whole evidence; whether the verdict is against evidence can only be considered by the Court at General Term, upon an appeal from an order granting or refusing a new trial.

(Before BOSWORTH & WOODRUFF, J.J.)

Heard, June 9; decided, June 27, 1857.

THIS action was brought against Frederick G. Richardson and David Woods, as defendants, and comes before the Court, on an appeal, from a judgment in favor of the plaintiff, taken by the defendant; Richardson only. It was tried before Mr. Justice CAMPBELL and a jury in October, 1855. It is brought to recover the amount payable by eight several instruments, in writing, called in the complaint promissory notes. They are, all, of the same date, and in the same form, but are for different amounts, and payable on demand, after different periods. The one first payable reads thus:

"New York, April 22d, 1850.

\$258,75-100.

For value received, we jointly and severally promise to pay C. L. Brown or order, in merchandise, on demand, after Nov. 1, 1850, two hundred and fifty-eight 75-100 dollars.

Endorsed
C. L. BROWN.

F. G. RICHARDSON
DAVID WOODS."

The complaint after averring that the defendants made each of said notes and describing them proceeds thus:

"This plaintiff further says, that said notes were duly endorsed by the said C. L. Brown to this plaintiff, and that he is the lawful owner and holder of said promissory notes; and although the said notes became due and payable, and the payment thereof was duly demanded of said defendants before the commencement of this suit, yet the said defendants have not paid the same or any part thereof."

It then avers that the defendants "are now justly indebted" to the plaintiff in the full amount of each of such notes, with interest from their dates, and prays judgment therefor.

The answer of Richardson, *inter alia*, puts in issue the allegations, as to the endorsement of the notes to the plaintiff, and as to his being the lawful owner and holder of them.

On the trial, *C. L. Brown*, was admitted as a witness for the

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plaintiff, against the objection and exception of the defendant, the objection being, "that the complaint does not show any sufficient transfer of the notes, upon which this action was brought." When the plaintiff offered to read the notes in evidence, the defendant "objected on the same ground as raised to the witness," which was over-ruled, and he excepted; when the plaintiff rested.

"The defendants' counsel moved for a dismissal of the complaint, on the ground that the notes or contracts stated in the complaint were not negotiable or transferable as promissory notes, and that there was no transfer proven to entitle the plaintiff to maintain this action; which motion was denied, and the defendants' counsel excepted."

The evidence of an actual sale and delivery of the notes, by C. L. Brown to the plaintiff, was explicit and uncontradicted, and was given by Brown, on his cross-examination, by the defendants' counsel.

"The defendants' counsel called *Frederick G. Richardson*, one of the defendants in this action, generally on his own behalf, to whom the plaintiff's counsel objected, which objection the Court sustained, and the defendants' counsel duly excepted."

The plaintiff obtained a verdict, under a charge, from the Court, which is not set out in the case, and to which no exception appears to have been taken. Judgment having been entered on the verdict, the defendant, Richardson, appealed from it to the General Term.

John Cook, for the appellant, contended that,

"The Judge erred in allowing these alleged notes to be read in evidence under the defendant's exception, they not being either negotiable or promissory notes, but a mere memorandum to have an amount in merchandise, and this complaint is wholly defective in the necessary form and averments to recover on these memorandums, falsely called promissory notes, as for money, when they are a contract only to deliver goods.

"Also, the Judge erred in not dismissing this complaint, as moved for by defendants, upon the plaintiff resting."

John Andrews, for plaintiff and respondent.

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BY THE COURT. BOSWORTH, J.—The defendant, Richardson, offered himself, “generally on his own behalf,” as a witness, and was excluded. To the decision excluding him, his counsel excepted. The plaintiff’s assignor, of the causes of action stated in the complaint, was examined as a witness on behalf of the plaintiff. But the examination of such assignor did not authorize the defendant to be a witness *generally* on his own behalf, but only “to the same matter” as to which the assignor had been examined (this action having been tried in October, 1855).—Code, § 399; Laws of 1851, p. 903. It is apparent from the case, as we think, that this offer was made, and that the Court and counsel treated and understood it, as an offer to examine Richardson to matters as to which the plaintiff’s assignor had not been examined, and that the defendant, Richardson, did not desire to be examined at all, if the examination was to be restricted to the same matters to which the assignor had been examined. The offer thus viewed was properly rejected. This exception is not noticed in the printed points of the appellant, submitted on this appeal; but, finding it upon the record, it seemed to us that it should not pass unnoticed.

But the appellant’s counsel contends that the complaint is fatally defective.

It is true that, the notes are not negotiable in such sense, that an assignee of them could maintain an action upon them at common law, in his own name. But they are vendible and assignable. They are correctly described in the complaint. The complaint states, that they were duly endorsed to the plaintiff, that he is the lawful owner and holder of them, and that payment of them, before the commencement of this suit, was duly demanded, and that no part of them has been paid. These allegations having been put at issue, are sufficient to admit proof of an absolute sale and delivery of the notes to the plaintiff, and of a demand of payment of them, and of a refusal by the defendants to pay.* We must presume that the cause was submitted to the jury under proper instructions, as the charge does not appear in the case.

* See *Prindle v. Caruthers*, 15 N. Y. R. 425.

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We are not at liberty to review the evidence, as to the general merits of the action, as no appeal has been taken from any order of the special term, denying a motion for a new trial. We cannot ascertain from the case before us that the defendant applied to the special term for a new trial, on the ground that the verdict was against evidence.

None of the exceptions, presented for our consideration, being well taken, the judgment must be affirmed, with costs.

HENRY WARDWELL v. RICHARD PATRICK and JOSEPH TARRATT.

The endorsement, by a Sheriff, or other officer, of the time of the receipt of a "summons" in an action, is not, of itself, evidence of the fact, so as to show the time of the commencement of an action, within the 99th section of the Code. There not being any statutory provision requiring such an endorsement, as in case of an execution, the rule which admits, as evidence, such endorsement in the latter case, does not apply.

A *bona fide* assignment of a clean bill of lading to a purchaser for value is equivalent to an unconditional delivery of the goods themselves, so far as to supersede and render unimportant any conditional contract between the original owner, or the party making such consignment, and the consignee.

(Before DUKE, Ch. J., and HOFFMAN, J.)

Heard, May 28; decided, June 27, 1857.

THIS is an appeal by the defendant, Patrick, from a judgment entered upon a verdict, in favor of the plaintiff, against him, for the sum of \$1018 48. The defendant, Tarratt, had a verdict in his favor, and recovered costs.

The stipulation of the parties, and the evidence, established the following facts:

The firm of Simcox, Pemberton, & Co., of Birmingham, sold, on the 31st of March, 1847, two cases of hardware, the property in question, to Edward W. Pemberton, of New York, on credit, and sent the same to Daniel Willis, of Liverpool, to be shipped to Pemberton. This was done, and a bill of lading (in which Willis is named as the shipper, and stating that the goods are to be delivered "unto order or assigns," and endorsed, "deliver the

within mentioned goods to Mr. E. W. Pemberton, or order—Daniel Willis,") and invoices were sent to Pemberton by the ship Garrick. The goods were worth £100. 9s. 4d. The defendant, Patrick, was authorized by the vendors to seize the goods *in transitu*, and sell them, or return them.

In the month of May, 1847, Pemberton assigned the bill of lading to Caleb Le Baron, who paid him \$500 for the same. On the 14th of May, 1847, the goods arrived. The duties were not paid, and the goods went to the public stores. They remained there until the 29th of January, 1849, when they were taken by Patrick, as agent and attorney of Simcox, Pemberton & Co., he paying the duties, and claiming the right to stop them *in transitu*.

The evidence is, that between January and May, 1847, Pemberton was indebted to Le Baron, in at least \$1,000. The transaction as to the bill of lading, took place early in May, 1847. Le Baron obtained it, and paid the money before the vessel arrived.

The goods were not bonded, but lay at the Custom House for about twenty months after their arrival.

The plaintiff claims under an assignment from Le Baron.

The cause was tried before Chief-Justice OAKLEY (and a jury), under whose direction the jury found a verdict against the defendant Patrick, upon which the judgment appealed from was entered.

The case presents one exception to the charge of the Judge, and two exceptions as to his rulings during the trial. The facts connected with the exception to the charge, are stated in the opinion of the Court.

Mr. Van Vleeck, for appellant.

J. E. Burrill, for respondent

BY THE COURT. HOFFMAN, J.—We shall first consider the exception to the charge of the Judge, respecting the effect of the Statute of Limitations.

After the testimony had been closed, the Judge remarked, that the pleadings set up the Statute of Limitations, and

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nothing had been said about it. The counsel for the defendants stated that the summons was not served until the 15th of February, and insisted that it was for the plaintiff to show that the action was commenced within six years. The counsel for the plaintiff contended that it was for the defendant to show that the action was not commenced within six years, and so the Judge ruled.

But apparently waiving this decision in his favor, the counsel of the plaintiff read in evidence the summons and the endorsement thereon, a copy of which is in the case. The counsel of the defendants again insisted that there was no proof to show that the action had been commenced within six years after the cause of action accrued.

The Judge charged, that as to the Statute of Limitations, the cause of action accrued on the 29th of January, 1849, when the goods were taken; that although the summons was served in February, 1855, yet from the delivery of it on the 25th of January, 1855, and its subsequent service, the action was to be deemed commenced at the time of such delivery.

To which ruling of the Judge, as to the proof of the commencement of the action, the counsel for the defendant then and there excepted.

The jury found for the plaintiff, as before stated.

The summons produced in evidence is dated January, 1855, and is endorsed—

“Received, January 25, 1855.

“J. C. WILLETT, *Under Sheriff.*”

The Code (§ 99) provides, that an attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of the title (Time of Commencing Actions), when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided. The attempt must be followed by service within sixty days.

The service was made on the 15th of February, and the section would be complied with fully, if the proof of the delivery to the sheriff on the 25th of January was sufficient. The certificate of the service by the sheriff is, that he served it on the defendants, at the city and county of New York.

By the tenth section of the Act "of Executions, and the Duties of Officers thereon," the sheriff or officer receiving an execution, shall endorse thereon the year, month, day, and hour of the day, when he received the same (2 R. S. 364, § 10). There are also express statutory provisions as to the duty of sheriffs to make return of process (2 R. S. 440, § 80, 81). In such cases the executions, or other process, with the return endorsed upon them, are made competent evidence between the parties, (*Henderson v. Cairns*, 14 Barbour Rep. 15; *Sheldon v. Payne*, 3 Selden, 453). But we do not find any provision making it the duty of the sheriff to endorse the day of receiving original process in an action upon it. The 78th section (2 R. S. 440) provides, that when process of any description is delivered to the sheriff to be executed, he shall give to the person delivering the same, if required, a minute in writing, specifying the names of the parties, the general nature of the process, and the day of receiving the same. No such certificate was here obtained.

Our opinion is, that the endorsement by the deputy-sheriff, of the delivery of the summons at the office, is not evidence of the fact. No statute has prescribed the duty of making such an endorsement; and it is upon that ground, and upon the faith of the law that officers correctly discharge a statutory duty, that the admissibility of such evidence depends.

It is then insisted, that the point was not raised, or at least does not, upon this case, appear to have been raised. We think, after some hesitation, that there is enough in the exception to call for a decision of the point. The exception is because the Judge ruled upon the proof of the commencement of the action. The naked proposition of law involved in the charge, no respectable counsel could dream of questioning. This was simply, that by a delivery of the summons to the Sheriff, on the 25th of January, followed by a service in the month of February, (of course within sixty days,) the action should be deemed to be commenced on the former day. It was the proof on which this proposition rested, which was questioned, not the law resulting from proven facts.

The fact that the counsel of the defendants, previous to the charge, insisted, that there was no proof that the action had been commenced within six years, confirms our view.

2. The next question arises upon the defendants' offer to show

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that the sale, from the owners of the goods to Pemberton, was a conditional sale, which offer was overruled.

The counsel of the plaintiffs correctly insists, that where a delivery of goods has been made unconditionally, the fact that the sale was conditional, provided the delivery was absolute, is of no importance, (*Smyth v. Lynes*, 1 Selden, 41.)

But is the transfer by endorsement of a bill of lading, equivalent to a delivery of property, so as, (when made to a *bond fide* purchaser,) to preclude evidence of a conditional contract between the original parties?

We think that a *bond fide* transfer of a clean bill of lading is tantamount to an actual delivery of goods themselves, so as to supersede any previous conditional contract between the consignee and owners. Hence, the proof offered would have been immaterial.

In *Conard v. The Atlantic Insurance Company*, (1 Peters' U. S. Rep. 445,) the law is thus stated. "It is a settled rule of commercial law that the consignee is thus constituted the authorized agent of the owner, to receive the goods; and by his endorsement of the bill of lading to a *bond fide* purchaser for a valuable consideration, without notice of any adverse interest, the latter becomes, as against all the world, the owner of the goods. This is the result of the principle, that bills of lading are transferable by endorsement, and thus may pass the property. It matters not whether the consignee in such a case, be the buyer of the goods, or the factor or agent of the owner. His transfer in such a case, is equally capable of divesting the property of the owner, and vesting it in the endorsee of the bill of lading. And, strictly speaking, no person but such consignee can, by any endorsement of the bill of lading, pass the legal title to the goods. But if the shipper be the owner, and the shipment be on his own account, and risk, although he may not pass the title by virtue of the mere endorsement of the bill of lading, unless he be the consignee, or, (what is the same thing) it be deliverable to his own order, yet by any agreement, either on the bill, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons except such a purchaser for a valuable consideration, by an endorsement of the bill of lading itself. Such an assignment not only passes the legal title as against his

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agents and factors, but also against creditors, in favor of the assignee."

3. Upon the other objection, as to the admission of a question put to Le Baron, by the plaintiff, it was but slightly pressed by the counsel, and we think it is not well taken.

There must be a new trial with costs to abide the event.*

WILLIAMS, PRESIDENT OF THE MARKET BANK, v. TOWNSEND ET AL.

Taking the note of a debtor, or a transfer of property from him, as collateral security only, without any agreement to extend the time of payment of the original debt, does not operate to suspend the remedy on the original debt, either against such debtor or his sureties.

The new security being a note of the original debtor at twelve months, secured by his mortgage of real estate, the whole effect, of taking them as collateral security merely, is, that such mortgage cannot be foreclosed until the twelve months' note becomes due.

Mere delay to sue the principal, however long continued, does not discharge the surety.

(Before BOSWORTH and WOODRUFF, J.J.)

Heard, June 18; decided, June 27, 1857.

THIS action is brought by R. S. Williams, as President of the Market Bank, against E. W. Townsend and George Williams, as makers of one note and endorsers of another, and against James B. Townsend, as endorser of the first note and maker of the last.

It was tried on the 18th of March, 1857, before CHIEF JUSTICE OAKLEY and a jury, and comes before the General Term on a verdict taken subject to the opinion of the Court.

The first note is dated January 8, 1855; is for the sum of \$5,000; is payable 45 days after its date, to the order of James B. Townsend, and is made by "E. W. Townsend & Williams."

The second note is dated January 26, 1855; is for the sum of

* As to the rights of a *bond fide* endorsee of a bill of lading for value, see *Dows v. Perrin*, 16 N. Y. R. 325.

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\$7,000; is payable 30 days after its date, to the order of "E. W. Townsend & Williams;" and is signed by "James B. Townsend."

The complaint alleges the making and endorsement of each note, and the delivery of it to the plaintiff before its maturity, and that before "it became due and payable, protest of said note was expressly waived" by the maker thereof; that no part of either has been paid, and prays judgment for their aggregate amount and interest.

James B. Townsend did not appear in the action. E. W. Townsend & Williams put in an answer, in which they alleged, that they made the first and endorsed the second note without consideration, and for the accommodation of James B. Townsend; that the plaintiff knew this before he took either note; and that before either note became due they so notified the plaintiff, and that he must look to James B. Townsend for payment. It also alleges, that at or about the time "the said notes became due and payable, the said James B. Townsend paid the same to the plaintiff by giving his own (the said James B. Townsend's) note for the sum of twelve thousand dollars, payable in twelve months from the date thereof, which said date was the 25th day of February, 1855, and at the same time executing and delivering to the plaintiff a mortgage upon property and real estate in the city of New York, for the purpose of securing the payment of said note last mentioned, which said mortgage was recorded in the office of the Register of the city and county of New York, in Liber 476 of Mortgages, page 658, on the 2d day of March, 1855, and which said note and mortgage last above described were accepted and received by the said plaintiff in payment and satisfaction of, and for the said two notes mentioned and set forth in the plaintiff's complaint." That this was done without the knowledge, consent, or assent of said defendants. That, by accepting and receiving said note of \$12,000 from James B. Townsend, and said mortgage, these defendants were discharged from all liability on each of said notes.

On the trial the plaintiff produced and read the two notes in evidence, and rested his case. The following proceedings were then had:

"The counsel for the defendant, after stating his defence to the court and jury, called as a witness—

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Robert H. Haydock, who testified:—I am the cashier of the Market Bank, and was at the times the notes in suit were taken and when they became due; these notes were renewals of original notes held by the bank, endorsed by the firm of Walter B. Townsend & Co.; when the notes in suit fell due they were not paid; about that time I received a note for \$12,000 from James B. Townsend, and a mortgage for the same amount, as collateral security for the payment of these two notes; (the mortgage and note received in evidence.) Neither Mr. E. W. Townsend nor Mr. Williams were present at the time; there was nothing said about extending time that I recollect; nothing was said about time on the notes in suit; we wanted more security, and we took what we could get.

Being cross-examined, he said: Nothing was ever realized from the note and mortgage taken from James B. Townsend as security; the mortgage was the third one on the property, the first one was foreclosed, and there was not enough to satisfy that.

The defendants' counsel here announced to the Court, that he abandoned all defence, as far as the note for \$5,000 was concerned.

The plaintiff's counsel offered to show that at the time this indebtedness accrued to these defendants, the money received on account of the note for \$7,000 was for E. W. Townsend & Williams, and that James B. Townsend made the note for their accommodation.

The defendants' counsel objected to this being shown. The Court overruled the objection, and defendants' counsel duly excepted.

Cross-examination resumed: I learned from James B. Townsend, the maker, that this note was for the benefit of E. W. Townsend & Williams.

(The defendants' counsel objected, on the ground, that admissions of James B. Townsend were incompetent evidence to this testimony. Objection sustained.)

James B. Townsend was a member of the firm of E. W. Townsend & Williams; he became so in March, 1854.

(Defendants' counsel objected, because the complaint set up that the copartnership consisted but of two members. The Court held that the description in the complaint of E. W.

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Townsend and Williams, as co-defendants, did not bind the plaintiffs as to the number of members in the firm. Defendants' counsel excepted.)

To the Court: I understood, from James B. Townsend, that he was a special partner, and had an interest of \$15,000 in the firm.

The following testimony was taken subject to the objections of defendants' counsel, as before taken.

Cross-examination continued: He told me he was a special partner at a time he wished to borrow \$1,000 for the firm; he said that the old firm of Walter B. Townsend & Co., consisting of Walter B. Townsend, E. W. Townsend, & Williams, were indebted to him in the sum of about \$15,000; that when Walter B. Townsend died, the other members of the old firm formed a new partnership, consisting of E. W. Townsend & Williams; and that they took him in as a special partner, by crediting the sum of \$15,000 due the old firm to him on their books.

Both sides rested.

The Court directed the jury to find a verdict for the plaintiffs for \$13,727 $\frac{7}{8}$ (the amount claimed, and interest), subject to the opinion of the Court at General Term, and to be heard there in the first instance, with liberty to the Court to annul, or modify the verdict as to the \$7,000 note, as they may be advised. Judgment suspended in the meantime. Verdict accordingly."

A. Wakeman, for plaintiff.

A. Dickinson, for defendants, made and argued the following points.

First.—By giving time to the maker, without the consent of the endorsers, the endorsers were discharged.

People v. Jansen, 7 John. 332; *Rathbone v. Warren*, 10 John. 587; *King v. Baldwin*, 2 John. Ch. 554.

Second.—The taking of collateral security, payable at a future time, is, in the absence of proof to the contrary, an agreement to wait until the security becomes due. (*Wood v. Jefferson Co. Bank*, 9 Cow. 194.) Third, the plaintiff's offer to show that at the time the indebtedness accrued to these defendants,

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the money received on account of the note for \$7000 was for E. W. Townsend and Williams, even if such fact were shown by competent evidence, amounts to nothing, as it is shown that the note was in renewal of another, endorsed by Walter B. Townsend & Co.; and even if it were not so, time given to an accommodation maker discharges the endorser. The ruling of the judge, in permitting the evidence, was erroneous. Fourth, the testimony of witness Haydock, as to the statement made by James B. Townsend, is incompetent to charge the defendants E. W. Townsend and George Williams as to co-partnership, and should not have been admitted. (*Whitney v. Ferris*, 10 John. R. 66; *Mitchell v. Roulstone et al.*, 2 Hall's R. 351, 357.) Fifth, the complaint alleges that the firm of E. W. Townsend & Williams consisted of but the two persons; and, under such circumstances, the plaintiffs certainly cannot drag a third party into the firm upon alleged statements of such third party, and then, by alleged admissions of such third party, bind the firm of E. W. Townsend & Williams.

James B. Townsend was competent to testify to such facts as might charge his co-defendants, and the evidence of his statements to a third party, though sufficient to charge himself (James B. Townsend,) were insufficient to charge his co-defendants.

The testimony of Robert H. Haydock, objected to by the defendants, and admitted subject to such objection, was erroneously admitted, and should have no weight in determining the amount of recovery.

A new trial should be granted or judgment given for the plaintiff for the \$5,000 note alone.

BY THE COURT. BOSWORTH, J.—The delivery, by Jas. B. Townsend, of a note made by him, for \$12,000, payable 12 months from its date, for the amount of the two notes in suit, with a mortgage to secure the payment of it, and the acceptance by the plaintiff of such note and mortgage, merely as collateral security for the payment of the two notes in suit, did not operate *per se* to suspend all right of action against Townsend, upon the two notes, until the maturity of the \$12,000 note.

Unless they were accepted upon an agreement, to extend the time of payment of the two notes to Jas. B. Townsend, until the

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new note matured, or for some other period of time, it was in the power of the plaintiff to sue him, at any time, on returning the new note and mortgage; perhaps such a surrender would not be necessary. (*Hughes v. Wheeler*, 8 Cowen, 77; *Frisbe v. Larned*, 21 Wend. 450-453; *Day v. Leal*, 14 J. R. 404; *Gahn v. Niemcewicz*, 11 Wend. 320-321.)

The rule seems to be settled, that taking the note of the debtor, or a transfer of property from him, merely as collateral security, without any agreement to extend the time of payment of the original debt, does not operate to suspend the remedy against the principal upon the original debt, or against his surety. (*Twopenny & Boys v. Young*, 3 Barn. & Cres. 208.)

This case and the rule which it declared, and other cases holding the same doctrine, were cited, and the rule itself was declared as absolutely in *Gahn v. Niemcewicz*, as we have stated it. See *Hubbell & Curran v. Carpenter*, 1 Seld. 171; *Pitts v. Congdon*, 2 Coms. 352; *Bangs v. Strong*, 7 Hill, 250.

The defendants, regarded merely as sureties, on paying the two notes, might be entitled to an assignment of the collateral security.

Whether they or the plaintiff, as a condition to their right to recover against J. B. Townsend on his original liability, before the collateral note matured, would be obliged to surrender the collateral note and mortgage, is a question, which does not now arise. I think they would not. The whole effect of taking the new note at 12 months, if taken merely as collateral security, would be this. The mortgage could not be foreclosed until that note fell due. The effect is the same, as if only a mortgage had been given at 12 months, and had been given and taken as further security, without any agreement to extend the time of payment of the original liability.

The proposition that, mere delay to sue the principal, however long continued, does not discharge the surety, is so firmly settled, that no authorities need be cited in its support.

There must be a judgment for the plaintiff on the verdict. Judgment was so entered.

PATRICK L. ROGERS v. JOSE VERONA.

The action was brought to recover the price of goods which the complaint averred had been sold and delivered to the defendant. The purchase was proved to have been made by the defendant, but the goods were delivered to a third person, and for the use of such person. Upon this ground, and upon the authority of *Smith v. Leland*, 2 Duer, 497; the referee dismissed the complaint.

Held, that there was not a failure to prove the allegations in the complaint in their entire scope and meaning, but merely in some particulars. Hence, the variance under § 169 of the Code, ought not to have been deemed material, as there was no proof that the defendant had been actually misled by it to his prejudice in maintaining his defence.

Held, also, that the variance ought to have been disregarded under § 176, which requires the Court to disregard any error or defect in the pleadings, which shall not affect the substantial rights of the adverse party. *Smith v. Leland* explained and distinguished.

(Before BOSWORTH and WOODRUFF, J.J.)

Heard, June 16; decided, June 27, 1857.

THIS action comes before the Court at General Term, on an appeal by the plaintiff from a judgment in favor of the defendant, entered on the report of a referee, dismissing the plaintiff's complaint.

The complaint herein avers that the plaintiff sold and delivered to the defendant at his request the goods mentioned in an account annexed to the complaint.

The testimony showed that the goods were for a boy named Diaz "by order of the defendant," who had purchased goods before for the boy Diaz, and had paid bills for him, and that on and after the presentation of the bill, for these goods, made out in the name of the defendant, he repeatedly promised to pay it.

The referee has found that the goods were not delivered to the defendant, but to the boy Diaz, and that the goods were for the exclusive use of the boy.

Considering himself bound by the decision of this Court in *Smith v. Leland*, 2 Duer, 497, and that the decision in that case would forbid a recovery under a complaint alleging a sale and delivery to the defendant, the referee has reported that the

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complaint should be dismissed. From the judgment entered thereon the plaintiff appealed.

B. M. Stilwell, for plaintiff and appellant.

F. R. Coudert, for defendant and respondent.

BY THE COURT. WOODRUFF, J.—It is too plain, we think, to admit of controversy, that where a defendant purchases goods, which by his direction are delivered to a third person, he is liable for the value thereof, as for goods sold and delivered to him. That before the Code of Procedure, a recovery could be had in such a case under a declaration averring a sale and delivery to the defendant, is quite certain. The common counts in assumpsit would cover such a transaction.

If the Code of Procedure requires that the precise circumstances should be stated according to their literal truth, instead of according to their legal truth and effect, then the complaint here varies from the facts found by the referee in this, that the goods instead of being delivered to the defendant personally were delivered to the boy Diaz, by the defendant's authority.

This was not a failure to prove the plaintiff's allegations in their entire scope and meaning, but a variance in some particulars only, and by the express terms of § 169 of the Code, no such variance between the allegation and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his defence upon the merits; and whenever it is alleged that the party has been so misled, that fact must be proved to the satisfaction of the Court.

By § 170, where the variance is not material as provided in the last section, the Court may direct the fact to be found according to the evidence. And by § 176, the Court is required to disregard any error or defect in the pleadings, which shall not affect the substantial rights of the adverse party.

Under the clear obligation imposed by these sections of the Code, we think that the variance should have been disregarded. The defendant did not prove that the variance had misled him in any sense. Probably he was not misled at all.

The bill of particulars furnished him with the items when the complaint was served.

The plaintiff's bill for the same goods had been rendered to him, and he had repeatedly promised to pay it. The defect in the complaint, if any, was not such as could affect the substantial rights of the defendant.

The case of *Smith v. Leland*, was in some respects peculiar. The Court deemed the finding of the referee against the weight of the evidence, and adjudged *that*, a sufficient ground for ordering a new trial. In that case the alleged purchase was by a third person professing to be authorized to purchase and receive the goods on the defendant's account. No evidence, there, showed or tended to show that the defendant himself made or ratified the actual purchase.

It was quite unnecessary for the Court to consider, and counsel do not appear to have called upon the Court to consider, whether, (if the finding of the referee had been according to the weight of the evidence), the variance even in that case might not have been deemed immaterial. Indeed the attention of the Court does not appear to have been called to any such question, and as a new trial was to be ordered it was of no materiality.

What is said in that case in regard to the defect in the declaration, may therefore, we think, be taken as expressing the opinion of the Court in regard to the appropriate manner of stating a sale and delivery to a third person, on the account and credit of the defendant, rather than as deciding that in a case such as we are now considering a variance of the description here found may not be disregarded.

It is true that the referee has not in his report, by an explicit finding, stated that the defendant made the purchase, but he places his decision upon the ground that delivery to a third person, under an authority from "the purchaser," when the goods are for the exclusive use of such third person, is not sufficient to support a complaint which avers a sale and delivery to the purchaser. If by this, is meant that if A purchases a hat, and directs the seller to deliver it to B, for B's use, proof of these facts would not sustain a complaint alleging in the usual form a sale and delivery to A. We think the case of *Smith v. Leland*, was not intended to sanction the rule. We also think that although it would be competent in such case, and more in accordance with the design of our present system of pleading, to

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set out the precise circumstances, yet to hold that the variance was so material that a complaint should be dismissed on that ground, when the defendant was fully apprised of the precise claim, long before suit brought, and had promised to pay it, and when there is no pretence that the defendant had been misled, would be making the rules of pleading more strict than they were before the Code, and more strict than the Legislature intended when they said that "the allegations of a pleading shall be liberally construed with a view to substantial justice between the parties."

In regard to the other points submitted by the defendant's counsel it must suffice to say that, the repeated promises of the defendant to pay the bill for the goods was sufficient evidence of value, and this also in connection with positive proof, that these goods were by mistake omitted when other bills were rendered, relieves the case from any difficulty arising from the rendering of a bill not including these charges. There was no final settlement of accounts in the sense claimed, to constitute a bar to the present claims.

And as to the suggestion that the promise was void, it is not only not found that the goods were not sold upon his sole credit, but the whole evidence shows, we think, that he was in truth the only debtor.

The judgment must be reversed, and a new trial ordered. Costs to abide the event.

WHITING ET AL., Respondents, v. OTIS, Defendant and Appellant.

Questions of fact to be determined upon conflicting evidence, and as to the credibility of the witnesses by whom such evidence is given, it is the province of the jury to decide. Their verdict will not be set aside, on the ground that it is not warranted by the evidence, unless it is clearly wrong.

In such a case, if irrelevant and incompetent testimony is admitted against the objection of the defendant, a verdict against him will be set aside, when such testimony was calculated to prejudice his defence with the jury.

When the main question was whether the defendant, falsely and fraudulently, and to the damage of the plaintiffs, represented a third person to be worthy of credit, evidence that, the defendant, on a subsequent settlement of his claims with such

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third person, by taking payment in goods, received some of the goods sold, by the plaintiffs to such third person through the alleged fraud of the defendant, is inadmissible, when no attempt has been made to prove that the defendant knew that fact, at the time he accepted such goods.

So also, is evidence that, a witness for the plaintiffs heard that the defendant, after the alleged fraud, went to the residence of such third person, to obtain a settlement and payment of the amount owing to the defendant from such third person.

It is error to preclude the defendant from putting questions to a witness for the plaintiffs, pertinent to matters as to which he had been examined by the latter, and excluding his answers, when competent and material.

(Before BOSWORTH & WOODBUFF, J.J.)

Heard, June 16; decided, June 27, 1857.

W. L. Whiting, M. T. C. Kimball and D. J. Whiting, copartners, bring this action as plaintiffs against Pierson M. Otis, defendant, to recover damages, sustained by reason of the defendant's falsely and fraudulently representing one John Tripp of Syracuse, to be worthy of credit, on which representations the plaintiffs relied and sold him goods.

The action was commenced in March, 1856, and tried in December, 1856, before Mr. Justice SLOSSON, and a jury. The plaintiffs obtained a verdict, and this action comes before the General Term, on an appeal by the defendant, from an order denying a motion for a new trial. The appeal presents questions of law arising on decisions made at the trial, as well as the question, whether the evidence given is sufficient to warrant the verdict?

The plaintiffs and the defendant are merchants doing business in the city of New York, and the representations, alleged to be false and fraudulent, and the sale by the plaintiffs to Tripp, relying on the truth thereof, were made in October, 1854.

D. Dodge Kelly, a witness for the plaintiffs, testified as to the representations made by the defendant, and to conversations, between himself and the defendant, after Tripp had failed. *J. Sanford Otis*, a witness for the defendant, testified in relation to the same transactions, and the testimony of these two witnesses was conflicting. *Kelly*, among other things, testified that the plaintiffs sold to Tripp, over \$600 in amount, on credit, taking notes at five and six months, except for a balance of \$98.75, which was sold on 60 days credit. That after the interview, at which the defendant made the representations complained of, he

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did not call on the defendant again until after Tripp had failed to pay the sixty days' bill. The witness further said, "I then called on him, and he said that he thought the account of Tripp was a hard case. That he considered Tripp's affairs in a bad state. I asked him as to the propriety of going to Syracuse, and he said he thought it would not pay. I recollect nothing else. I went to Syracuse a few days after this second interview. I found Tripp's affairs bad; I saw a small amount of goods, a variety of boots and shoes.

"Ques. Did you learn, when at Syracuse, that the defendant had just been there?

"This question was objected to by defendant's counsel and the said Justice overruled the said objection, to which decision of the said Justice, the defendant's counsel excepted.

"Ans. I learned that one of the Otis's had been there. Can't say which one. When I returned to New York, I called again on defendant at his store, and saw him. I made various enquiries to ascertain what goods of Tripp's Mr. Otis had got. Defendant showed me some of the goods that he got from Tripp. And said he could not make on what he had got, more than seventy cents on the dollar, on the amount of his claim." "He stated that Tripp was behind in his payments at the time of the sale. That was the substance of what he said. I saw the goods he had got from Tripp.

"Ques. Was any of the goods you then saw, the same goods the plaintiff had sold to Tripp?

Defendant's counsel objected to this question, on the ground that it was irrelevant and immaterial, and the said justice overruled the said objection, and the defendant's counsel excepted.

"Ans. I recognized some of the goods as the same the plaintiffs had sold to Tripp."

The evidence of J. Sanford Otis, was to the effect that the firm, of which the defendant was a member, sold to Tripp, in October, 1854, to the amount of \$240, on a credit of four months. That in February, 1855, after this debt became due, the defendant went to Syracuse, and settled with Tripp for this and prior indebtedness, taking goods in payment, and that the second interview, testified to by Kelly, took place in March, 1855.

John Tripp's examination, taken *de bene esse*, was introduced

by the plaintiffs, who read parts thereof, and among others, the following questions and answers, viz. :—

"23d Ques. Up to the time of the purchase of the goods from plaintiffs in October, 1854, had you any doubt of your ability to pay your debts and continue your business?

Ans. Well, I don't know that I had, though I was pretty hard up; if my goods would fetch first cost, I thought I could pay my debts.

24th Ques. Did you buy the goods of the plaintiffs, and of J. S. & P. M. Otis, in October, 1854, with the belief that you could pay for them and with intent to do so?

Ans. I did."

The defendant offered to read the 6th cross-interrogatory to Tripp, and his answer thereto, which are as follows :

"6. Ques. Did you at that time believe yourself to be solvent, good for all you bought, and able to go on with your business?

Ans. Yes, sir, I believed I was at that time, though I was behindhand with some notes or demands against me."

The plaintiffs objected to its admission, the Court excluded it, and the defendant excepted.

Such other of the proceedings had, and testimony given, as are necessary to be known, in order to understand the decisions made at the General Term, are stated in the opinion of the Court. The jury found a verdict for the plaintiffs, for \$693 95.

The defendant moved for a new trial on a case containing the evidence given and exceptions taken. The motion was denied, and from the order denying that motion, this appeal is brought.

S. P. Nash, for plaintiffs.

Wm. H. Leonard, for defendant.

BY THE COURT. BOSWORTH J.—There is direct conflict between the testimony of Kelly, for the plaintiffs, and of J. S. Otis, for the defendant, in relation to the representations made by the defendant as to the solvency of Tripp. The same remark is equally applicable to the testimony of those two witnesses, as to what the defendant said, in the interviews between him and Kelly, after the failure of Tripp.

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If the representations testified to by Kelly were made, and, if the defendant, after Tripp's failure, made the statements to which Kelly testifies, there can be no doubt of the plaintiffs' right to recover. The jury had the witnesses before them, and would, naturally, in deciding upon evidence so conflicting, be influenced to some extent, by the manner of each witness.

The questions of fact to be decided, and those of credibility to be determined, are questions for the jury.

There were some circumstances to aid them in forming a conclusion, which are not present to the Court on an appeal.

We do not feel at liberty to say that the verdict of the jury is so clearly against evidence, as to justify us in setting it aside, on that ground.

But when the testimony on the part of the plaintiff is in such direct conflict with that on the part of the defendant, it is obvious that, very slight considerations may influence a jury to accept the testimony of one witness in preference to that of the other. Justice, to each party, requires that he should not be subjected to any possible prejudice by the admission of incompetent, or the exclusion of competent and pertinent testimony.

That the defendant's firm, on receiving goods in payment of what Tripp owed them, received some which he had bought of the plaintiffs, was a fact which should not have been treated as strengthening the plaintiffs' case, or weakening the defendant's, unless the defendant had knowledge or reason to suspect, at the time he took them, that Tripp had so purchased them.

There was no attempt to prove such knowledge. Yet the admission of that evidence was pressed by the plaintiffs, and though its reception was objected and excepted to, by the defendant, was received by the Judge. Kelly, as well as Tripp, was closely examined with a view to establish that fact. It was, therefore, treated as a material fact, and which, if proved, was entitled to consideration.

The Court, in admitting the evidence against the objection of the defendant, treated it as material.

There is not the slightest proof, nor was there any attempt to prove, that the defendant or his firm knew that Tripp had purchased any of these goods of the plaintiffs. They were not received until after the four months credit given by the defend-

ant's firm, on the sale made to Tripp, in October, 1854, had expired. That sale amounted to \$240. The other notes held by defendant's firm matured, one in November, and two in December, 1854. Hence, there was no haste on the part of the defendant's firm, in seeking payment from Tripp.

It was not sought until some two months after one bill sold by the plaintiffs to him had become due.

We do not think this testimony was relevant for any purpose. It was calculated to prejudice the defendant with the jury. The admission of the evidence being urged and admitted as material, we cannot see that the jury were not influenced by it. The Judge erred in admitting it, and a new trial should be granted.

We think the Judge also erred in excluding the 6th cross-interrogatory to Tripp, and his answer thereto. They were of the same nature as the 23d and 24th cross-interrogatories, and the answers to the latter.

The 6th cross-interrogatory, and the answer to it, were legitimate and proper, on a cross-examination. The evidence was pertinent and material, with respect to the credibility of Tripp, and of all such evidence given by him, as it might have been urged to the jury, tended to show that Otis had knowledge from Tripp, before making the representations complained of, that, although Tripp might possibly be solvent, the prospects were, that he could not long continue his business.

We think the Judge erred in allowing Kelly to testify what he heard at Syracuse, in respect to one of defendant's firm having been there. Such evidence was incompetent. It was not merely irrelevant, but it was illegal. Hearsay evidence as to any matters in issue in the action was totally inadmissible.

If this were the only exception, we might refuse a new trial, if we could justly take the ground that the answer to the question could not have prejudiced the defendant. It is undeniable that one of defendant's firm was at Syracuse in February, 1855.

But in one aspect, this evidence might have prejudiced the defendant.

Kelly testified that when the bill sold by plaintiffs to Tripp, at 60 days from October 5th, 1854, fell due, he called on the defendant; that the defendant then said he thought Tripp's affairs were in a bad state, and that the defendant thought it would not pay

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to go to Syracuse, and that Kelly went to Syracuse in a few days after this interview. This testimony, if credited, would locate this conversation, and Kelly's journey to Syracuse, early in December, 1854.

What Kelly heard while at Syracuse, he was allowed to testify, and to such testimony the defendant excepted. There is no testimony, besides this, which tends to show that either member of defendant's firm had been to Syracuse between the sale in October, and February, 1855.

Even Kelly, on his cross-examination, locates this interview in March, 1855. But he does not choose to say that he had not been to Syracuse in the previous December. He does state, however, that, although the defendant said at that second interview, that "It would not pay very largely to go to Syracuse: I did, however, go."

There is no evidence, besides Kelly's, that either of defendants' firm went to Syracuse before February, 1855. Tripp did not stop business until October, 1855.

The jury may have concluded, if they placed more reliance on the testimony of Kelly, than on that of J. S. Otis, that Kelly called on the defendant early in December, when Tripp failed to pay the sixty day bill, and then had such an interview with the defendant, and immediately after that went to Syracuse; and there heard that one of the defendant's firm had been there previously to secure their claims. The jury, if they believed this, might justly regard the defendant's conduct with more suspicion, than they would if it was clear that the defendant had manifested no concern about his own claims until after all of them had matured, and Tripp had wholly failed to pay.

In the one aspect of the case, the defendant when the new credit had not more than half expired, had become alarmed, and had been to Syracuse and taken payment of the debts due and not due, by receiving goods at less than their value, thus showing a great anxiety to get something, and a consciousness that he could not expect to do better by delay.

In the other, he manifested no premature anxiety, nor made any efforts to secure his debts, until after all had become due, and Tripp had failed to pay any part of either.

If we did not feel obliged to grant a new trial on other

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grounds, we should have forborne to examine this exception, not only because it was not made a point on the argument, but because the defendant's counsel, on his attention being called to it by the Court, disclaimed relying upon it, as sufficient to entitle him to a new trial. We have deemed it proper to advert to it, lest by possibility the case should again come before the Court, containing the same exception, when it might not be waived.

A new trial must be granted, with costs to abide the event.

THOMAS WHITLOCK, PHILIP L. FRENEAU and WILLIAM L.
ANDERSON v. JOHN MCKECHNIE.

The consideration of the three notes, on which this suit was brought, was a purchase of goods made by the defendant from the firm of Whitlock, Freneau, Anderson & Co., the payees in the notes, and the sole defence was that when the goods were purchased, one Vose was a partner in the firm, and ought, therefore, to have been made a plaintiff in the action. It appeared, however, that the notes in suit were a renewal of those first given for the goods, and that before this renewal Vose had ceased to be a partner.

Held, that as the complaint averred that the plaintiffs are the payees in the notes mentioned, and that they are the lawful holders and owners thereof, and these allegations are not denied in the answer; the fact that Vose was a partner when the goods were purchased was wholly immaterial, and that upon this ground alone the plaintiffs were entitled to judgment.

Held further, that it was competent to the plaintiffs to show that before the notes in suit were given, Vose had retired from the firm, and had assigned to the plaintiffs all his interest in the debt which the notes represented, since the necessary effect of the evidence was to prove that the plaintiffs, as the sole owners of the debt, were the sole owners of the notes, thus effectually disproving the allegation that Vose (who, it was thus shown, never had any interest in the notes) was a necessary party to the action.

The objection that this evidence ought not to have been received, as it tended to show that the plaintiffs were suing, in part, as the assignees of Vose, although no such assignment was stated in the complaint, was certainly groundless. The evidence, on the contrary, proved that as the notes, when delivered, belonged wholly to the plaintiffs, no assignment from Vose was necessary or could have been made; although, under the statute, when the words, "& Co." are added to the name of a mercantile firm, they raise a presumption that there is a partner not named, yet this presumption may be overcome by positive proof, and in the opinion of the Court was so overcome, on the trial of this action. It was proved, that although

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the notes were given to the firm of Whitlock, Freneau, Anderson & Co., yet the plaintiffs were in fact the sole payees.
Judgment for plaintiffs upon the verdict.
(Before BOSWORTH & WOODRUFF, J.J.)
Heard, June 3; decided, June 27, 1857.

ON the trial of this action, a verdict was ordered for the plaintiff, subject to the opinion of the Court, at General Term. It was tried before Chief Justice OAKLEY and a jury, in March, 1857.

The action is brought upon three several promissory notes made by the defendant, payable to the order of Whitlock, Freneau, Anderson, & Co., and dated May 13th, 1856.

The complaint avers, that the plaintiffs are the payees in the said notes mentioned, and are now the lawful holders and owners of the same.

The only defence set up in the answer is, that the notes were given for goods purchased by the defendant, from the firm of Whitlock, Freneau, Anderson, & Co., which firm consisted of the plaintiffs in this action, with one Charles L. Vose, who, at and prior to the time aforesaid, was an active general co-partner with the plaintiffs, doing business under the name and style aforesaid, and the defendant thereupon insists that there is a defect of parties, plaintiffs.

Upon the trial the plaintiffs produced and read the notes in evidence and rested.

The defendant then proved that he purchased goods from the firm of Whitlock, Freneau, Anderson, & Co., in the year 1855; that Vose was then a partner with the plaintiffs in that firm that he gave notes for such merchandise; that Vose ceased to be a partner on the 31st of December, 1855 (or 1st of January, 1856); that he then went out of the firm, assigned all his interest in the partnership effects to the plaintiffs, and had no interest there afterwards; that the notes now in suit were given in renewal of the said original notes; that they were made payable to Whitlock, Freneau, Anderson, & Co., to designate the plaintiffs, who, at the date thereof, were the only persons then interested in the previous notes, and then also the persons composing the firm.

The defendant objected to any proof that Vose had, previously to the making of these notes, assigned his interest to

the plaintiffs, because there was no such allegation in the complaint.

The defendant still insisting that Vose should have been made a party plaintiff, the Chief Justice directed a verdict for the plaintiffs for \$329, 22 (the amount of the notes with interest), subject to the opinion of the Court. The defendant excepted to the decision. The questions of law, arising at the trial, were directed to be heard at the General Term, in the first instance, and the entry of judgment to be suspended in the mean time.

J. R. Hills, for plaintiffs.

F. C. Cantine, for defendant.

BY THE COURT. WOODRUFF, J.—The complaint avers, that the plaintiffs are the payees in the notes mentioned, and that they are the lawful holders and owners of the notes.

These allegations are not denied, and upon this ground alone, we think the plaintiffs were entitled to judgment for the amount of the notes. The fact set up in the answer, that the consideration of the notes was a purchase of goods by the defendant from the plaintiffs and Vose, at that time a partner with the plaintiffs, was wholly immaterial, if in truth the notes themselves were made payable to the plaintiffs, and they were the holders and owners thereof. The answer does not even state that Vose was a partner at the time the notes were given, nor that he has any interest therein.

But if the answer could be deemed to raise any material issue, the proof was uncontradicted and decisive in favor of the plaintiffs. It showed that before the giving of these notes Vose had retired from the firm; that the plaintiffs had become the owners of the claim, and that, in fact, these notes were given and made payable to the plaintiffs by their then firm name. The circumstance that Vose was once interested in the claim was wholly immaterial; his interest had ceased; the debt was due to the plaintiffs, and the defendant's promise was to them.

The exception taken to the admission of evidence that Vose assigned his interest in the effects of the previous copartnership is groundless. That evidence was strictly responsive to the case

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sought to be made by the defendant's answer, and his proof that Vose was once a member of the firm. It was not offered for the purpose of showing, and it did not show that Vose assigned the notes in suit to the plaintiffs; but it showed that he never had any interest in these notes, and that the consideration and the legal title was in the plaintiffs, at the very giving of the notes. Thus it disproved the claim that Vose should have been made a party plaintiff; and although the defendant's evidence had done that pretty effectually already, the plaintiffs had a right to add further evidence to the same point if they thought proper.

The defendant's counsel on his points submitted to us, refers to § 3, of the act concerning limited partnerships, (1 Rev. Stat. 765,) and insists that the use of the word, "and company," by the plaintiffs, is *prima facie* evidence, that the firm was composed of more persons than those whose names appear in the firm name. Although the statute relating to limited partnerships, does not appear to have any bearing upon the subject, since here is no pretence that there was any limited partnership, we, nevertheless, think that the defendant is right in saying that the use of the term referred to is, as against the plaintiffs, *prima facie* evidence, that there is a partner not named. Our general statute requiring that where the designation, "and company," or "& Co." is used, it shall represent an actual partner or partners, creates such a presumption. But it can be overcome by positive proof, and was most effectually overcome on the present trial.

No other question in reference to, or which might arise under the Statute, was raised on the trial, or on the argument of the appeal. The debt for which the action is brought, was due by the defendant. The form of the indebtedness, originally was to the firm of Whitlock, Anderson, Freneau & Co., of which Vose was a member. He having made a transfer to the plaintiffs, they were the real parties in interest, and could recover in their own names therefor. It was natural, and we have no doubt, legal, in taking a note for the debt, to continue for the mere purpose of the extension of credit, the same payees in form as had before designated the creditors to whom the debt was due; and there seems no very good reason why the note should not have been so treated. Taking such a note for a previous debt could hardly be

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deemed carrying on business under a firm name, which was forbidden. In this mode the debt might be discriminated from the business of the new firm. The plaintiffs' counsel, and the witness appear, however, to regard the firm described as payees, as under the circumstances of the case indicating only the plaintiffs, who, in truth, had the sole interest.

The right to recover would have been equally clear, had Vose's original interest been averred, and his transfer stated.

The plaintiffs should have judgment upon the verdict with costs.

ANTON HAUCK *v.* JOSEPH HUND.

The payee and first endorser of a note, cannot recover against the second endorser, either in an action on the note itself, or on the allegation and proof of a verbal agreement, that the note was endorsed by the second endorser to accommodate the maker, and to secure payment to the first endorser, of a loan of money made to the maker on the security of such endorsement, and on the agreement of the second endorser to pay the note at maturity, if the maker did not.

To allow a recovery in such a case would violate the rule which prohibits the clear legal import of a written contract to be varied by parol, and would violate the Statute of frauds, which declares all agreements to answer for the debt or default of another, unless in writing and subscribed by the party to be charged, to be void.

(Before BOSWORTH and WOODRUFF, J.J.)

Argued, June 8; decided, June 27, 1857.

THE questions which arose on the trial of this action, being questions of law only, a verdict was taken for the plaintiff subject to the opinion of the Court, and such questions were then directed to be heard at the General Term, in the first instance. The counsel of the parties agreed at the trial, such agreement being evidenced by an order then entered, that, the Court at General Term might dismiss the complaint, if so advised. The cause now comes before the General Term, on a case presenting the questions of law, so directed to be there heard. The action was tried before Mr. JUSTICE WOODRUFF and a jury, in March, 1856. The facts, on which the questions of law arise, are as follows:

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The only written contract held by the plaintiff, (so far as the evidence in this action disclosed the facts,) to which the defendant is a party, reads as follows, viz.

"\$450 $\frac{1}{4}$ ¢.

New York, May 4, 1855.

"One month after date, I promise to pay to the order of Mr. Anton Hauck, four hundred and fifty $\frac{1}{4}$ ¢ dollars, value received.

(Signed)

"WM. SEEBACK, 15 $\frac{1}{2}$ Bowery.

(Endorsed)

"JOSEPH HUND, 121 Hester.

"ANTON HAUCK, 267 Bowery."

The endorsements upon the note, of the names of the defendant, Joseph Hund, and of the plaintiff, Anton Hauck, are in the order of priority above written. This note is a renewal of a former note made by Seeback for the same sum, dated Feb. 1, 1855, and payable three months after its date to the order of Hauck, and endorsed by Hund and Hauck, separately, and in the same order as the renewal note.

Seeback applied to the plaintiff in January, 1855, for a loan of money, and the plaintiff requiring security for its repayment, the defendant Hund agreed with the plaintiff, that if he would lend the money to Seeback, Hund would endorse the note of Seeback to be given for the money loaned, and if Seeback did not pay the money loaned, Hund would pay it himself. The defendant, for the purpose of fulfilling that agreement, and with intent to become bound to the plaintiff for the sum specified in the note of Feb. 1, 1855, placed his name thereon; and the plaintiff, in reliance upon that agreement, discounted that note. The plaintiff at that time not having money which he could lend, but being a dealer in cheese, and Seeback being pressed for money, the plaintiff, at his solicitation, and in order to raise money for Seeback's use, and without any intent to get more than legal interest, sold 2,506 pounds of cheese at thirteen cents per pound, that being the best price which could be obtained, although the fair market value was then fifteen cents per pound, and paid the moneys received therefor, and other moneys of his own, to an amount, including the loss upon the cheese at two cents per pound, equal to the amount of the note; Seeback

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having agreed, in order to induce the plaintiff to make such sale, to bear such loss. This sale was made, and the proceeds thereof, and other moneys of the plaintiff, were paid by him to Seeback, in reliance upon the aforesaid agreement and endorsement, the note so endorsed by the defendant as aforesaid having been delivered to the plaintiff before he paid such moneys to Seeback.

The sale of the cheese was a *bond fide* transaction, and was not intended by the plaintiff or Seeback as a cover to conceal an intent to secure to the plaintiff more than at the rate of seven per cent. interest on the money loaned. The purchaser of the cheese sold it for eighteen cents a pound not long after he bought it.

On the day the note of Feb. 1, 1855, matured, the note in suit was made and endorsed, and delivered to the plaintiff, in renewal thereof, and for the purpose and with the intent of continuing the several liabilities of Seeback and Hund to the plaintiff, intended to be created by the agreement hereinbefore set forth, and the original note and the endorsement thereof by the defendant.

When the note in suit became due, payment of it was duly demanded of Seeback, who refused to pay it; due notice of such demand of payment, and of such refusal, was given to the defendant Hund.

The note in suit, with interest on it from its maturity to the time of the trial of this action, amounted to \$471.

A verdict was taken for that sum for the plaintiff, subject to the opinion of the Court at General Term, upon the questions of law arising upon the facts above stated, and with liberty to the Court, (granted by the consent of the counsel given at the trial) to dismiss the complaint if so advised, and to either party to turn the case into a bill of exceptions.

The case was submitted on printed points.

Oulter, Townsend, and Van Wagoner, for plaintiff.

F. S. Stallnecht, for defendant.

BY THE COURT. BOSWORTH, J.—Such an agreement as has been proved, is an agreement of Hund, to be answerable for the

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debt or default of Seeback. On such an agreement Hund is not liable, unless it is in writing, and subscribed by him. 2 R. S. 135, § 2, sub. 2.

The only written agreement held by the plaintiff to which Hund is a party, is one by which, according to its legal effect, Hauck the plaintiff, promises to pay to Hund, or any subsequent endorser of the note, the note itself, if Seeback fails to pay it, provided that payment of it is demanded of Seeback on the day it falls due, and notice of such demand, and of Seeback's default, is duly given to Hauck.

Hund does not agree, either by the terms of the written contract, or by its legal effect, to pay anything to Hauck, in any event.

If the plaintiff can recover in this action, he must do so, by violating two settled rules of law.

First. He must be permitted to prove by parol, that the actual agreement was radically different from the written one, which he cannot do.

Second. When such agreement has been proved by parol, he must be permitted to recover upon it, while the statute is peremptory, that the defendant shall not be charged upon such an agreement when proved verbally, merely because it was not reduced to writing and signed by the defendant.

These views, though briefly stated, appear to us to be a perfect answer to the plaintiff's right to recover.

It cannot be denied that the effort of the Courts to find some distinction on which they could make parties liable upon their contracts, when clearly proved, although the only written evidence as to what they agreed, was a note endorsed in form like the present, has led to decisions apparently conflicting, in relation to the question before us.

Whenever the Courts depart from the plain meaning of the statute, or a well established rule, in search of some extremely technical consideration, to obviate the supposed hardships of a particular case, it is not strange that conflicting decisions should occur, and that following one questionable precedent after another may lead to consequences, that render it necessary to recur to fixed principles and abide by them as rules of decision.

The object of the statute exempting a person from liability

upon his promise or agreement to answer for the debt or default of another, unless the agreement is in writing and subscribed by the person sought to be charged, was to prevent frauds and perjuries.

The rule which forbids the receipt of verbal evidence to establish an agreement contrary to the terms, or clear legal import of the contract of the parties as reduced to writing and signed by them, is one of obvious necessity. Without a firm and uniform application of it, there can be no certainty or safety in the business transactions of life.

It is better for the public that, an individual should occasionally suffer, in consequence of his having omitted the formalities made by law essential to a valid contract, as a penalty for his carelessness, than that, written contracts deliberately drawn, and formally signed, should be subject to be varied in their terms, by the uncertainty of human memory, and the selfishness of interest, or that statute law should be disregarded by charging a party under circumstances, which that law declares shall create no liability.

Whether there was any such mistake in the form of drawing the note, as would create a right in favor of the plaintiff to have it reformed by a Court of Equity is a question which does not now arise. (*Phelps v. Garrou*, 8 Paige, 322.) No such relief has been asked, nor has any case been stated by the complaint, with a view to establish a right to it. The complaint states a cause of action arising on contract, and seeks the recovery of money only.

The cases of *Hall v. Newcomb*, 7 Hill, 416; *Spies v. Gilmore*, 1 Com. 321; *Durham v. Manrow*, 2 id. 533; *Hall v. Farmer*, 2 id. 553; *Brewster v. Silence*, 4 Selden, 207; *Hahn v. Hull*, 2 Abb. 352, and *Cottrell v. Conklin*, 4 Duer, 45, show a disposition to hold, and some progress in holding parties to their contracts, as they have made them. They deny the right to create by judicial legislation a liability where none exists, by the terms or legal import of the written contract, and enforce the statute of frauds, so as to exempt a party from liability upon contracts, which that statute declares to be void.

We think the verdict should be set aside, and a judgment entered for the defendant, dismissing the complaint with costs.*

* See *Draper v. Snow*, 6 Duer, 662.

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**THE CORN EXCHANGE BANK v. THE CUMBERLAND COAL
COMPANY.**

It is undeniable that a corporation may be bound by the act of an agent where the agent acts in the discharge of his duties, and within the scope of his powers as such, although the particular act may not have been directed or authorized by any formal resolution of the directors of the company.

So a corporation is bound by the act of an agent done on its behalf and in its name, when it accepts the benefit of the act, although the agent had no prior authority, express or implied. The acceptance of the benefit is an adoption of his act.

But it is certain, that in every case, in order to bind a corporation, there must be proof of the prior authority of the agent, general, or special, or of the subsequent adoption of his act.

When the powers of the agent are solely derived from an express authority, the terms of the authority must be strictly pursued, or it must appear that the corporation has accepted the benefit of his act, or has otherwise adopted it.

In the principal case, two members of an executive committee of the defendants, who were only authorized to act when the president, as one of their number, was present, in his absence made a contract for a lease by the defendants of certain rooms belonging to the plaintiffs, and it appeared that the defendants had never entered on the occupation of the rooms.

Held by the Court that the contract was void, and that no action thereon could be maintained against the defendants for the recovery of rent.

Verdict for plaintiffs set aside, and new trial granted.

(Before BOSWORTH & WOODRUFF, J.J.)

Heard, June 9; decided, June 27, 1857.

CASE upon a verdict for the plaintiffs, taken subject to the opinion of the Court at General Term. This action was tried before CH. J. OAKLEY and a jury, in December, 1856. It was brought to recover a quarter's rent of certain rooms in a building belonging to the plaintiffs. It was alleged that the defendants had leased the rooms for one year, at the rent of \$2,500.

The controversy turned solely on the validity of the contract of hiring, and all the material facts upon which the decision of the question depended are fully stated in the opinion of the Court.

T. C. T. Buckley, for the plaintiffs.

T. D. James, for the defendants.

BY THE COURT. WOODRUFF, J.—It appears by the evidence herein, without contradiction, that by the by-laws of the defendants, it is provided that their concerns "shall be managed by a president and a board of twelve directors, of which board, the president shall be a member, and have the casting vote when the board is equally divided. Or by an executive committee of three directors, * * * and the president in like manner shall have the casting vote when the committee is equally divided, and that at stated meetings the president and four directors, and at intermediate meetings the president and two of the executive committee, shall constitute a quorum for the transaction of any business."

And further, that "in case of absence or sickness of the president, the board of directors or executive committee, as the case may be, shall have power to appoint a president, *pro tempore*."

It further appeared that the president of the plaintiffs, was himself a director, and at the time of the transactions in question, a member of the executive committee of the defendants. And, therefore, in his dealings with the defendants through their executive committee, he must be taken to have had full knowledge of these by-laws, under which the concerns of the defendants were managed.

At a meeting of the board of directors of the defendants, on the 4th day of April, 1855, nine directors being present, and among them, Mr. Dunham, the president of the plaintiffs, the defendants' president being absent, A. M. Sherman, Esq., was appointed chairman of the meeting; and on this occasion Mr. Dunham was appointed a member of the executive committee to fill a vacancy caused by a resignation.

At this meeting the attention of the board being called "to the proposition to lease offices from the Corn Exchange Bank," the proposition was "referred to the executive committee with full power, and to report at the next meeting of the board."

The executive committee consisted of Messrs. Thompson, Bloodgood, and Dunham; and Mr. Mehaffey was the president.

Mr. Dunham, when appointed a member of the executive committee, stated to the board that, as he was acting for the Corn Exchange Bank (the plaintiffs), in the matter of leasing their

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rooms, he should not meet with the executive committee on that subject.

On the following day Messrs. Bloodgood and Thompson, being at the office of the defendants, concluded on behalf of the defendants (the president not being present), to take the rooms, and accordingly Mr. Bloodgood addressed and sent a note to Mr. Dunham, as president of the plaintiffs, in these words:—

“Office of the C. C. & I. Co.

New York, April 5, 1855.

Dear Sir:—This Company will take the rooms over the bank.
By order of the Ex. Com.

F. BLOODGOOD, of the Ex. Com.”

The president of the defendants, on his return, learning what had taken place, requested Mr. Dunham, the plaintiffs' president, to release the defendants from their engagement; this was refused. The power of Dunham to bind the plaintiffs appears to have been derived from a resolution of the plaintiffs' Board of Directors in these terms:

“On motion resolved, that the renting of the offices in the banking house be referred to the officers with power.” And the testimony showed that the officers of the bank were the president and cashier; and there was evidence that the bank went into that building the previous year and that the president was the officer who had always made the contracts for renting the rooms in the building, and that the cashier collected the rents.

The defendants never entered into the occupation of the rooms, and this action is brought to recover rent thereof for three months, viz., from May 1st to August 1st, 1855, after the rate of \$2,500 per annum, and there was evidence sufficient to show that the renting, to which the correspondence and resolution referred, was orally spoken of as a renting for one year, from May 1, 1855, at the rent mentioned, viz., \$2,500 per annum.

We are of opinion that no contract of hiring was established which was binding upon the defendants.

It is not necessary to deny that corporations may become bound by the acts of their agents, done in the discharge of their

duties, and within the scope of the power of the agents, and that without a formal vote of the Board of Directors: nor to deny that contracts will be implied against corporations, when they have accepted the benefit of what is done by the agent in their name, and have so adopted the act.

Under what various circumstances a formal act of the Board of Directors may be dispensed with it is not necessary to say, but this is clear, there must be an authority to contract, or there must be an adoption of the contract, otherwise the corporation is not bound.

If an agent have been clothed with powers sufficiently comprehensive, he may bind the corporation. This may be by an express grant of authority, or by the very appointment to an office, the ordinary duties of which involve the exercise of the alleged power.

The present case requires no consideration of these general inquiries. We have before us just the powers conferred by the defendants, and the manner in which they were to be exercised, and we also find the plaintiffs dealing with the defendants with knowledge of both.

No contract was made with the plaintiffs by a general agent. The defendants did not occupy the rooms, and by accepting the benefit of the alleged agreement, become impliedly bound to pay the rent.

The subject of taking the rooms in question was referred to the defendants' executive committee with power.

That committee, therefore, had under this reference, and perhaps also under their general authority to "manage the concerns of the company," power to bind the defendants.

But to constitute a quorum for the transaction of any business, it was necessary that the president and two members of the committee should be present. If the president was absent the committee must appoint a president *pro tempore*.

Instead of a formal meeting, two members of the committee confer together and agree to take the rooms, and give notice accordingly. This we think was not enough. It is left in some doubt by the evidence whether the president of the defendants was not in the city, though not at the defendants' office at the time; at all events, his place does not appear to have been filled,

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or if the appointment of Mr. Sherman, chairman of the Board of Directors, had any effect beyond the meeting of the Board itself, then he was not present at the meeting of the committee. Probably his duties as chairman ceased with the meeting of the Board.

We think it quite clear that the sending of the letter in question created no contract binding upon either the plaintiffs or the defendants. What took place afterwards consists of efforts on the part of the officers of the defendants to induce the plaintiffs to relinquish any claim, and the manifestation of a determination by the plaintiffs to insist on the contract.

The general rule that a corporation can only act in the mode prescribed by the law of its creation, where the prescribed mode is restrictive and not cumulative in its nature, is applicable by analogy to this case. (*Dawes v. the North River Ins. Co.*, 7 Cow. 462.) Although the restrictions here are contained in the by-laws of the defendants, knowledge of those by-laws is brought home to the plaintiffs through their president.

And not only so; the very basis of the plaintiffs' claim is an authority to the executive committee given by a resolution of the Board, passed in the presence of the plaintiffs' president, and the action of that committee could only bind the defendants when had in the manner which the laws of its government prescribed.

It is urged, also, that the defendants were not bound because, in this transaction, Mr. Dunham acted alone, when he had no authority from the plaintiffs themselves to let their offices without the concurrence of the cashier. We are of opinion that, under the resolution of the plaintiffs' Board, read in evidence, if that stood alone, it would have been necessary for the plaintiffs to show that both of the officers of the Bank concurred in the letting. Still, had the undertaking, on the part of the defendants, been made in such form and manner as would bind them, probably the sanction of the plaintiffs' Board of Directors, implied in the statement contained in one of the letters read in evidence, which states that the Board think they cannot annul the contract, might sufficiently show an approval of the act of their President. And besides, there was evidence tending to show the previous usage of the Bank, which indicated an actual concurrence of the two officers in the letting of the rooms by the President, from

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time to time, and by reasonable inference, the approval by the Bank of the exercise of that power, in the manner in which it had theretofore been done.

We do not think it necessary to inquire here, to what extent a Banking Company may employ its capital in the erection of offices for the purpose of renting them. We do not suppose that the right to own a building is rigidly confined to the exact number of rooms their immediate purposes require. There may be good reasons for anticipating an increase of business, and providing for its transaction. There may be other reasons why they may have one or more rooms than their immediate business requires them to use. We should be reluctant to say, in such case, that they must suffer those rooms to remain unoccupied, or that the tenant who occupies may refuse to pay rent.

This point was not raised at the trial, and does not, therefore, properly arise here.

The verdict must be set aside and a new trial ordered—costs to abide the event.

SAMUEL C. HANFORD, Respondent, v. DANIEL C. HIGGINS,
Defendant & Appellant.

A request by the defendant to the plaintiff, to attend, as physician and surgeon, upon a third person, and a promise by the defendant to the plaintiff that, if he will so attend, the defendant will pay therefor, and the bestowing of such attendance by the plaintiff, upon such request, and relying solely upon such promise, render the defendant liable to pay what such attendance is reasonably worth. His promise need not be in writing to be obligatory. It is an original undertaking. The fact that he was under no obligation, prior to making such request and promise, to furnish or procure such attendance, does not make it essential to the validity of such a promise, that it be in writing.

But the defendant in such a case may, at any time, give notice to the plaintiff, that he will not be liable for attendance or services subsequently rendered, and on so doing, the plaintiff can make no claim on him for services or attendance subsequent to such notice.

A defendant has no right to be examined in his own behalf, merely because the wife of the plaintiff's assignor of a thing in action (being the plaintiff's cause of action) has been examined for the plaintiff.

(Before DUER, SLOSSON, & WOODRUFF, J.J.)

Heard, April 8; decided, June 27, 1857.

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THIS action comes before the General Term, on appeal by the defendant from the judgment. It was tried before Mr. Justice BOSWORTH and a jury, in June, 1856, when a verdict was rendered for the plaintiff for \$500 damages.

The complaint states two causes of action :

1. As assignee of Wm. C. Mead, for board of and nursing one William C. Hetzell, from September, 1854, to June, 1855, at defendant's request, and on his promise to pay therefor, the sum claimed, over and above all payments made on account thereof, being \$334.

2. For attendance by the plaintiff, as physician and surgeon, upon said Hetzell, within the same period, at the like request, and on the like promise, for which \$500 was claimed.

It appeared that William C. Hetzell, on the 14th of September, 1854, being then a journeyman sail-maker in the defendant's employ, had his leg fractured, and was taken to the hospital, from which place he was removed to Mr. Mead's, on the 19th, that he might be better nursed and attended to. While he was at the hospital, Mrs. Mead, with whom he had formerly boarded, saw him, and messages from the defendant to Mrs. Mead, and from her to him, were carried by Joseph C. Hetzell, which constituted part of plaintiff's proof that Mrs. Mead took William C. Hetzell to her house, on being requested and employed by the defendant so to do, and relying on his promise to pay therefor.

The proof, upon the question, whether the defendant employed the plaintiff as physician and surgeon, consisted of messages sent by the defendant, through third persons.

One Thomas Burns, was examined for the defendant, and gave evidence tending to show that he was instructed by the defendant, while Wm. C. Hetzell was at Mrs. Mead's, on the defendant's being requested to employ a consulting physician, to inform her and the plaintiff, that he had nothing to do with the employment of a doctor, that all he had agreed to do or would do, was to allow William \$5 a week for three months, and that he communicated such message. Evidence was given with a view to contradict his statements, as to what he did in truth say to Mrs. Mead and the plaintiff, when assuming to communicate the message, the defendant had sent to them.

Evidence was given as to a bill, to the amount of \$120, having

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been made out by Mrs. Mead, and sent to the defendant by one McKinstry, and whether it was made and sent as being the whole amount of her claim, and the defendant insisted that if he was liable at all, for her services, his liability was limited to the sum named in that bill. The defendant's theory of the case was, that Mrs. Mead agreed with W. C. Hetzell, while he was at the hospital, absolutely, and unconditionally to take him and nurse him, and that defendant's promise was collateral to this, and was merely a promise to allow to William \$5 a week for three months, to assist and relieve him, and that he never authorized any one to employ a physician and surgeon, or a nurse, at his expense, or agreed to compensate for such services.

Mrs. Mead was examined as a witness for the plaintiff. She having been so examined, and the plaintiff claiming to recover for her services and for the board and nursing of Wm. C. Hetzell, under an assignment by Mr. Mead, her husband, of his claim therefor, the defendant offered himself as a witness in his own behalf, and on being objected to, the Court excluded him, to which defendant's counsel excepted.

As the questions decided, relate to exceptions taken by the defendant to the charge of the Judge, and to his refusal to charge in the terms of requests made to him in that behalf, the evidence given is not stated.

When the testimony was closed, the counsel for the respective parties summed up the case, and the defendant's counsel requested the Judge to charge the jury as follows:—1. That the promise proved by the evidence of Joseph Hetzell is void, and that the defendant is not bound thereby. 2. That if Mrs. Mead agreed to take William C. Hetzell at the hospital, any subsequent promise of defendant is collateral and void. 3. That in order to have a verbal promise on the part of the defendant to pay for the board or medical attendance of William C. Hetzell binding, there must have been some obligation on the part of the defendant to furnish such board and medical attendance, otherwise the promise is void for want of a writing. 4. That the promise of defendant was in the nature of a gratuity and revocable at any time; that the notice sent by Mr. Burns was a revocation of any promise; and defendant is not liable after that time. The same of defendant's refusal to pay the bill, which was communicated to the plaintiff.

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That the plaintiff is bound by the charges in his complaint and can recover only at that rate for the time up to the notice.

That the plaintiff is limited as to Mead's bill to the amount of \$120, contained in the bill sent over by Mr. McKinstry.

The Court charged, *inter alia*, as follows:

Did the defendant, before Mrs. Mead unconditionally agreed to take Hetzell into her house, and board and nurse him, promise to pay her for so doing; and did she receive him solely on the credit of such promise? If so, the plaintiff is entitled to recover for such board and nursing.

If Mrs. Mead unconditionally agreed to receive him, and board and nurse him, before the defendant made any promise to her, and she received him to be boarded and nursed in pursuance of such unconditional agreement, the defendant is not liable, although he subsequently promised to pay her.

Were her services commenced solely on the credit of a promise by the defendant to pay her charges? If they were, he is liable, although his promise was not in writing. To which charge defendant then and there excepted.

The liability of the defendant, therefore, depends upon the facts, which you may find the evidence establishes. If she refused to allow Hetzell to come to her house, until the defendant was seen, and some satisfactory arrangement had been made with him for the payment of her charges, and the defendant sent a request to her to take him, and promised that he would pay the expenses, and she took him relying solely upon such promise, he is liable. To which defendant's counsel excepted.

If you find that she agreed absolutely to take Hetzell before the defendant had been seen on the subject, and that she took him in consequence of such agreement, he is not liable, although he subsequently agreed to pay her for her services and for his board.

If you find the facts which the Court has stated would make him liable, then the next question is, for how much would he be liable? Unless she agreed to take him at an agreed price per week, the defendant is liable for what her services are really worth. If any price was agreed upon, the evidence does not show the defendant a party to it. If any price was fixed, it must have been between her and Hetzell. You have heard what they

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both swear on this point, and, from that and the other evidence, you will determine how the fact is. An agreement with Hetzell as to price would not bind the defendant, and would be strong evidence that Mrs. Mead did not take Hetzell relying on the defendant as the party to whom credit was exclusively given by her.

If, at any time, defendant gave notice that he would not be liable, or that he denied all liability, from the time of such notice there would be no claim on him for future services.

The question is, what notice did Burns give to Mrs. Mead when defendant was sent to, about a consulting physician, not what message defendant sent, unless it was communicated to the plaintiff. What message did defendant send back when the bill of \$120 was presented? If that denied having anything to do with paying any charges, it was equivalent to a notice that he would not be liable for the future.

The same principles apply to the claim made by the plaintiff for his professional services. Did he commence them, relying solely on a promise of defendant to pay for them? If there was such a promise, and plaintiff commenced, relying solely on that promise, defendant is liable for the fair value of the services up to the time that he gave the plaintiff notice that he would be no longer liable. On this point, the evidence is different from that relating to the claim of Mrs. Mead. There have been no payments to plaintiff by Hetzell, and no communication between the plaintiff and defendant personally on the subject. The communications as to them were through third persons.

If you shall find such facts as, under the instructions given to you, make the defendant liable to pay either or both of these claims, then you will determine the proper compensation to be allowed for the claim or claims which you shall find to have been satisfactorily proved. If you hold the defendant liable to pay the proper and reasonable charges for nursing and attending Hetzell by Mrs. Mead and family, you will deduct from the sum you shall fix as their value, or to be paid, the amount which Mrs. Mead received from Hetzell.

The Court refused to charge further or different in respect to the requests made by the defendant's counsel.

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The defendant's counsel excepted.

The jury, after retiring to deliberate, came into Court, and rendered a verdict in favor of the plaintiff for \$500 damages.

Judgment having been entered on the verdict, the defendant appealed from it to the General Term.

Gilbert Dean, for appellant, made and argued the following points:

I. The promise proved was clearly void by the statute of frauds.

1. There was no obligation on the part of defendant to provide for Hetzell.

2. Hetzell requested Mrs. M. to take him, and the plaintiff to attend him.

3. He was legally and morally liable to pay.

4. The promise that is claimed to be binding was made *after* Mrs. Mead had taken him, and plaintiff had attended him.

II. But any verbal promise made by Higgins, to pay for board, &c., of Hetzell, was void.

1. The statute of frauds requires both a consideration and a writing.

2. In this case there is a consideration, but no written promise. (*Kingsley v. Balcome*, 4 Barb. 131; *Green v. Cresswell*, 10 Adolphus & Ellis, 453; *Roberts on Frauds*, 209; *Jones v. Cooper*, Cowper, 227: "You must supply my mother with bread, and I will see you paid.")

3. The contrariety of evidence, and the difference that existed between defendant and plaintiff, and Mrs. Mead, as to defendant's obligations, show the necessity of a writing in all such cases.

4. That portion of the charge which says, that if Mrs. M.'s services were commenced solely on the credit of a promise by defendant to pay charges, defendant is liable, was clearly erroneous, as applied to this case.

III. The Court erred in refusing to charge as requested by the defendant in his first, third and last request.

The right to require a specific charge on any point of law raised by the evidence, is undoubted. (3 Kernan, 838, *Zabriskie v. Smith*.)]

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1. The first request was right—Was it complied with?
2. In a case like this, there are peculiar reasons why a jury should be instructed specifically as to the effect of any particular promise.
3. The third request involves a point before discussed.
4. The last request claimed that a party, after presenting a bill, was bound by its amount when no error was shown.

IV. The contract proved was void for want of mutuality. There was no obligation on the part of either Mrs. Mead or plaintiff, for a breach of which defendant could have sustained an action.

The assent to a binding contract must be mutual. Every agreement ought to be so certain and complete that each party may have an action upon it. It must be obligatory on both parties, or it binds neither.

A written agreement "to remain with another, two years, for the purpose of learning a trade," is void, for the want of an engagement in the same instrument to teach. (8 Car. & Payne, 289, *Lees v. Whitcomb*.)

V. A new trial should be granted, because the verdict is wholly without evidence.

1. The amount is wrong; the claim was for \$834 for eight months. The Court held we were not liable after the notice (two months). Verdict is for \$500.

2. There is no evidence of any authorized communication to plaintiff, except by Joseph Hetzell.

C. Schaffer, for plaintiff and respondent.

BY THE COURT. SLOSSON, J.—The charge to the Jury presented the questions, involved in this case, as favorably to the defendant as a correct exposition of the law admitted of, in respect to both claims, and under the charge, their finding is conclusive upon these points. 1st. That Mrs. Mead undertook the care and boarding of Hetzell, relying solely on the defendant's promise that the expense thereof would be paid by him. 2d. That the plaintiff's services were rendered on the faith of a like promise. This takes the case out of the statute.

It is impossible to say, from the amount of the verdict, at what

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rate the board, lodging, and services of Mrs. Mead, or the services of the plaintiff were estimated. But as the Court charged that, unless she agreed to take Hetzell at a certain price per week, the defendant would be liable for what her services were really worth, and in respect to the plaintiff's professional services, that the defendant would be liable for their fair value up to the time that he gave the plaintiff notice that he would be no longer liable, we must assume that the jury fixed the amount upon a principle which they considered the evidence to have warranted.

The assignor of the claim for board, &c., was Mr. Mead the husband, and he was not examined. The examination of his wife as a witness, (which was proper) does not bring the case within § 399 of the Code. This is a sufficient answer to the exception to the ruling of the Judge excluding the offer of the defendant as a witness, and makes it unnecessary to decide whether the offer was too broad as not having been restricted in terms to "the same matter," to which Mrs. Mead had testified.

In respect to the requests to charge, made by the defendant's counsel; the Court properly refused to charge the first, as it was for the jury to determine whether in fact the services were rendered solely upon the faith of the defendant's promise or not, and the Court correctly charged the law in either alternative.

The second request was substantially charged.

It is not necessary that a party promising absolutely to pay for goods to be sold, or services rendered to another, should be under an obligation to pay, at the time he makes such promise. The question is, whether the goods are sold or services rendered, on the sole credit of the party so promising; if they are, the promise is not to pay the debt of another, but an original undertaking, and therefore not within the statute of frauds requiring it to be evidenced by a writing. The Court therefore properly refused to charge the third request. (*Dixon v. Frazee*, 1 E. D. Smith's R. 82; *Flanders v. Crolius*, 1 Duer, 206.)

The fourth request was charged in substance.

In respect to the request to charge, that the plaintiff could only recover at the rate of charges as stated in his complaint, up to the time of the notice, it is sufficient to say, that the Court having instructed the jury that, "if at any time the defendant gave notice that he would not be liable, or that he denied all

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liability, from the time of such notice there would be no claim on him for future services," and the jury having found \$500 only for both classes of service, it does not appear, which way they may have found the fact of notice, nor that they have exceeded in their verdict the amount claimed in the complaint as due for the board and nursing. The defendant is therefore not prejudiced by the omission or refusal of the Judge to charge that proposition specifically.

In respect to the request to charge that the plaintiff was limited as to Mead's bill to the amount of \$120, contained in the bill sent over by McKinstry, the evidence shows that that bill was made out in March, whereas the services continued until June; the Judge therefore properly refused to charge that proposition.

The exceptions to the charge, we think unfounded. On the whole charge the law was correctly laid down to the Jury.

The judgment must be affirmed.

GEFFCKEN v. SLINGERLAND & MCFARLAND.

G., on the application of N., agreed to discount a note made by S. & McF., for \$1283 27, on being furnished with collaterals, being told at the time by N. that he wished to procure the discount for a friend who was not named, the friend being S. & McF.; and the latter thereupon delivered to N., as such collateral, a note which they owned, for \$2,000, made by R. and M., and N. delivered it to G., as such collateral, telling him that as the \$2,000 note first matured, "to collect it and credit it in our account," by our account meaning the account of a firm of which N. was a member; and thereupon G. procured the note of \$1283 27 to be discounted at bank, on the security of the note for \$2,000 left with such bank as collateral, and the \$2,000 note was paid at maturity. G. has no right, as against S. & McF., to use such moneys to take up another note made by N.'s firm, then running to maturity, and which he had endorsed and procured to be discounted for such firm. Such a use and application of the proceeds of the \$2,000 note would be a fraud on S. & McF. G. knowing, when he discounted the note for \$1283 27, that N. was acting for a friend, knew that he was the agent of such friend, and that the \$2,000 note was the property of the latter, and was furnished by him as security for the payment of the note to be discounted, or, at all events, he knew enough to put him on inquiry.

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The relative rights of G. and of S. & McF. are not affected by the fact that the latter paid at bank the \$2000 note, pursuant to an arrangement between themselves and the makers of such note, by which the makers were to have a renewal for \$1500 of its amount on payment of \$500 in cash (the balance of it) to S. & McF., which balance such makers so paid to S. & McF., and gave them a renewal note for \$1500. Nor are such relative rights varied by the further fact, that S. & McF., before they paid the \$2,000 note, were informed by N. "what had passed between him and G. in relation to it," it not appearing that S. & McF. ever sanctioned or intended to sanction the application of the \$2000 note to any other purpose than to pay or secure the note for \$1283 27.

Held, further, that the payment of the \$2000 note, and the receipt and use of its proceeds by G., operated, as between him and S. & Mc. F., as a payment of the note of \$1283 27, and made him their debtor for the difference; and, therefore, G. could not recover of S. & McF. the amount of the note for \$1283 27 (that being the note on which this suit is brought), but that the latter were entitled to a judgment against him for the difference between the amount of such two notes, with interest, the right to such excess being set up as a counter-claim, on a proper allegation of the facts in that behalf.

Judgment ordered accordingly.

(Before BOSWORTH and WOODRUFF, J.J.)

Heard, June 2d; decided, June 27th, 1857.

THIS action comes before the Court, at General Term, on a verdict taken for the plaintiff, subject to the opinion of the Court. The plaintiff is Adolph Geffcken, and the defendants are William J. Slingerland and Luther W. McFarland, composing the firm of "Slingerland & McFarland." The action was tried before Ch. J. OAKLEY and a jury in April, 1856.

The complaint avers the partnership of the defendants, and the making by them of a promissory note, of which the following is a copy :

\$1,283 27.

New York, 15th Dec. 1853.

Six months after date, we promise to pay to the order of ourselves, twelve hundred and eighty-three 27-100 dollars, at the Mechanics' Banking Association, value received.

(Signed,)

SLINGERLAND & MCFARLAND.

That the defendants, before its maturity, endorsed it, and "delivered the same;" that the plaintiff "is the lawful owner and holder of the said note for value;" that it is due and wholly

unpaid; and prays judgment for its amount, with interest from its maturity.

The answer denies that any sum is due on this note, and avers, that when the defendants delivered that note they delivered with it, as collateral security for the same, another note, which they held and owned as endorsees, made by Ryder & Malony, for \$2,000, dated February 20, 1854, at three months; and that the same were so taken by the plaintiff, with knowledge of the facts.

That said collateral note was paid at maturity, and that the plaintiff was bound, after applying sufficient of the proceeds to satisfy the first note, to refund the balance to the defendants, and the answer makes a counter-claim therefor.

The reply puts in issue the fact that the Ryder & Malony note was given merely as collateral, or that the plaintiff so received it, and avers that he received it from Gildemeister & Neustaedter as collateral for the payment of their note for \$2,226 40, and for the note in suit, both of which he had endorsed and procured to be discounted for them; that the proceeds of the Ryder & Malony note were applied by him to the payment of the Gildemeister & Neustaedter note, which he had been obliged to pay as endorser, without notice of any of the facts set up in the defendants' answer.

The printed case, after setting forth the evidence given and proceedings had at the trial, concludes thus:

"The Court, by consent of the parties, ordered a verdict to be taken for the plaintiff for two thousand dollars, subject to the opinion of the Court upon the questions of law and fact, upon a case to be made and to be heard in the first instance at the general term, with liberty to the Court to turn the same into a special verdict for the defendants, and adjust the amount. Judgment to be suspended until the decision of the general term, and with liberty to either party to turn the case into a bill of exceptions."

When the case was moved at General Term, the Court, on opening the papers, suggested that it was not properly before the Court, as the disputed questions of fact had not been determined by the jury.

But the counsel of both parties insisting that there was not, and could not be any dispute as to the facts proved; that, in reality, the case presented only questions of law, and expressing

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an earnest desire that it should be heard and decided, without subjecting the parties to the delay and expense of another trial, the Court consented to hear it. The facts established by the evidence are as follows, viz.:

"About the first of May, 1854, the defendants borrowed of the firm of Gildemeister & Neustaedter the sum of one thousand dollars, to be returned in a week. Before the money became payable, the defendants applied to that firm to get a note discounted, and upon the suggestion of Gildemeister that he had a friend who could get a note discounted if defendants had any collateral security, the defendants placed in his hands the note now in suit, dated December 15, 1853, made by the defendants for \$1,283 27, payable six months after date, to the order of themselves (the defendants) and delivered to Gildemeister as collateral security for its payment a note for two thousand dollars, dated February 20th, 1854, at three months made by Ryder and Malony to the order of G. S. Mott, and by him endorsed to the defendants.

Gildemeister took the note in suit to the plaintiff, and asked him to get it discounted, and told him that he wanted it for a friend, but without stating for whom.

The plaintiff told Gildemeister in reply to the application that if he would get some collateral security, he, the plaintiff, would get the note discounted. Gildemeister then gave him the note in suit, and in accordance with the plaintiff's requirement that he should "get" some collateral, gave him also the two thousand dollar note, made by Ryder and Malony, which he had received from the defendants, as collateral security for the note in suit.

As the note of Ryder & Malony would become due before the other note matured, Gildemeister told the plaintiff to collect it and credit it in his account with Gildemeister & Neustaedter.

The plaintiff then took the two notes to the Bank of the Republic and left the note in suit for discount with the Ryder & Malony note as collateral security, and it was discounted by the bank, on the 12th day of May, and the proceeds were paid over to Gildemeister.

On the 23d day of May (twenty-four days before the note in suit became due,) the \$2000 note of Ryder & Malony was paid at the Bank of the Republic, and the plaintiff drew a check for

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the money. It does not appear that at that time, or at the time the notes were delivered to the plaintiff, or at any intermediate time Gildemeister & Neustaedter owed the plaintiff in account anything. But in the previous April the plaintiff had procured a note of Gildemeister & Neustaedter for \$2,226 46, to be discounted with his endorsement at the same bank, and that note would become payable on the 5th of June, then ensuing. On the day the \$2,000 note was paid, or on the following day, May 24th, Gildemeister & Neustaedter failed; and on the 24th of May the plaintiff, by arrangement with the bank, took up the \$2,226 46 note, although not yet due, applying towards its payment the \$2,000 paid in upon the note of Ryder & Malony, and the note in suit not being paid at maturity the plaintiff has brought this action against the defendants to collect that also.

It further appears that shortly before the note of Ryder & Malony became due, they made an arrangement with the defendants for a partial renewal of this note, and they paid to the defendants five hundred dollars and gave a new note for fifteen hundred dollars, whereupon the defendants agreed that they would take up the \$2,000 note and restore it to the makers. In pursuance of this arrangement the defendants, in fact, paid the two thousand dollar note at the Bank of the Republic when it became due, and before they did so one of the defendants "was informed by Mr. Gildemeister of what had passed between him and the plaintiff in relation to it." But there is not in this or in anything else testified to, any satisfactory proof that the defendants ever sanctioned or intended to sanction the application of this note to any other purpose or indebtedness, except to the note now in suit.

Jer. Larocque, for the plaintiff, moved for judgment on the verdict, and contended, 1. That the plaintiff having received the Ryder and Malony note from Gildemeister and Neustaedter, with authority to collect and credit it in account, and having had no notice until long after he had applied its proceeds to the payment of the \$2,226 40 note, of any equity in favor of the defendants, or that they had ever held the Ryder & Malony note, had clearly the right to apply the proceeds of the Ryder & Malony note as he did apply them.

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2. If Ryder & Malony had themselves paid their note at its maturity, the transaction would have been the same as if they had paid it to Gildemeister & Neustaedter, to whom Slingerland & McFarland had transferred it, and Gildemeister & Neustaedter had then paid over its amount to the plaintiff, in part payment of the \$2,226 40 note.

3. The Ryder & Malony note did not bear the name of the defendants in any form. Gildemeister & Neustaedter were its lawful holders by delivery from the defendants themselves, and with the right to collect it and transfer it. That was the intention of the transaction, as it matured before the note in suit. There is no question, therefore, in the case of a conversion of property, such as arose in the cases of *Stalker v. McDonald*, and *Coddington v. Bay*, cited by the defendants' counsel.

4. There was no mistake or ignorance of fact on the part of the defendants when they paid the Ryder & Malony note. On the contrary, it was with full notice from Gildemeister that Gildemeister & Neustaedter had delivered it to the plaintiff to collect and credit it in their account. It was, therefore, a voluntary payment by the defendants themselves; and the defendants, after having paid it, are not at liberty to contest the right of the plaintiff which they thereby admitted. (*Clark v. Dutcher*, 9 Cowen, 674, and cases cited; *Oakley v. Crenshaw*, 4 Cowen, 250; *Walker v. Ames*, 2 Cowen, 428; *Sprague v. Birdsall*, 2 Cowen, 419; *Hogan v. Weyer*, 5 Hill, 389.)

5. Even if the payment of the Ryder & Malony note could be considered, *pro tanto*, as a payment of the note in suit, the defendants had no right of action against the plaintiff, after such voluntary payment, to recover the balance; and, having no right of action, cannot recover that balance by way of counter-claim.

6. The plaintiff is entitled to judgment.

Joshua M. Van Cott, for the defendants, argued the following points.

I.—The note in suit was paid out of the proceeds of the collateral note, which matured first, (20 J. R. 646, *Bay v. Coddington*; 6 Hill, 93, *Stalker v. McDonald*; 2 Kernan, 313, *Decker v. Mathews*.) The plaintiff is not a *bonâ fide* holder of the collateral note, except to the extent of the principal note. II.—The doctrine of estoppel has no application to the case.—3 Kernan, 316, 1 Greenl. Ev

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§ 207; 8 Wendell, 483; 2 E. D. Smith's R. 14; 4 Barbour, 495; 5 Denio, 154; 3 Hill, 219; 2 Kernan, 100. (1.) It was a condition of the discount of the principal note that the plaintiff should hold, and of course be paid, the collateral; and the bank had a clear right to have it paid.—(2.) As between plaintiff and defendants, the collateral was paid by its makers. They in fact paid it, a part in cash and part by a new note. The mode of doing it was of no consequence, and did not affect the original transaction or the rights of the parties to it.—III. The plaintiff held the balance of the proceeds of the collateral note, subject to the order of the defendants; who, upon the principle of the first point, are entitled to recover it on their counter-claim. IV. Under the power reserved to the Court, judgment should be rendered for such balance, with interest and costs.

BY THE COURT. WOODRUFF, J.—If the General Term will suffer their duties to be so far extended that, by consent of the parties, they will assume to determine all questions of fact and law, their labors will not only be greatly complicated, but will embrace a class of duties which the law has devolved upon others. We are called upon, on this occasion, to review the evidence taken, at what it would be a misnomer to call a trial, and to find the facts which, in general, it is the duty of the jury to find, and then to decide the law applicable to those facts. And this we are to do without having the witnesses before us, or any opportunity to judge of their intelligence, or, from their manner, to estimate the degree of confidence which ought to be reposed in the language they use.

We have, nevertheless, addressed ourselves to the subject, and if we should err in our conclusions of fact, we should regret more deeply than we now do, that the facts were not determined by the jury, who were empanelled for that express purpose.

(The opinion, after recapitulating the facts as above stated, proceeds as follows:)

Although the plaintiff was not (on the 12th of May, 1854) informed of the names of the defendants, he knew that Gilde-meister was acting in this matter as the agent of the friend for whom he desired to procure the discount, and he received the notes and procured the discount with that knowledge.

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And although the agent, Gildemeister, told him, "as the \$2,000 note of Ryder and Malony fell due before the other, to collect it and credit it in our account" (*i. e.* Gildemeister and Neustaedter's account), yet it does not appear that this was for any other purpose than as security for the note so to be discounted. There was no express authority to apply the money which would be paid in, to any other indebtedness—no other indebtedness then existed. As the note was made by third parties, who in due course of business might be expected to pay the note at its maturity, nothing was necessarily implied in this instruction but what it would be the plaintiff's duty to do, and his right to do, if he retained possession of the two notes. And in view of the other testimony to the acts and admissions of the plaintiff, in relation to the notes in question, the just conclusion is, that he received and held the \$2,000 note as collateral security for the note now in suit, and as security for that alone, and that this was the actual understanding of the parties at the time. It was all that he required as a condition of getting the note discounted. It was all that there was any motive to offer him. It was all that Gildemeister could offer him, without practising what in judgment of law would be a fraud upon the defendants. And the plaintiff having notice that Gildemeister was procuring the discount for a friend, knew, or had reason to know, that the securities offered belonged to the friend for whom he was acting, and he therefore knew that any application of the \$2,000 note to any other debt would be a violation of the rights of such friend; at all events, there was enough to put him on enquiry.

The better conclusion is, that neither he nor Gildemeister contemplated any fraud; it is rather to be presumed that they did not; and the whole evidence, taken together, is not only in harmony with, but sustains the conclusion that the \$2,000 note was received by him and held as collateral security for the note in suit, and for that only. He so treated it; he himself endorsed it with the term "collateral." He so used it, delivering it to the bank as security for the note in suit.

The conclusion is irresistible that the application of the proceeds of the \$2,000 note to the note of Gildemeister and Neustaedter, discounted the previous April, and not yet due, was an expedient resorted to by the plaintiff upon the failure of that

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firm to divert a security, held for a different purpose, to a use to which it was not designed, and to which he had no right to apply it, and to which he knew he had no right to apply it.

If this conclusion rested upon otherwise nicely balanced testimony, it would be greatly strengthened by the suspicious manner, out of the usual course of business, in which it was done. Applying it to a note not due for some eleven days thereafter, as if apprehensive that the friend for whom the note in suit was discounted would seek to arrest the money in that stage of the transaction; for at that time the plaintiff had no reason to suppose that the note was not paid in due course by the Messrs. Ryder and Malony.

The \$2,000 note belonged to the defendants. It was placed by them in the hands of Gildemeister as security only for the note in suit. It was placed by Gildemeister in the plaintiff's hands for that purpose.

Gildemeister had no authority to use it for any other purpose.

The plaintiff made no advance upon it except to procure the discount of the note now in suit.

If Gildemeister attempted to authorize the plaintiff to apply its proceeds to any other debt, it was a fraud upon the defendants, and the plaintiff could only hold it for the amount of his advances or liabilities incurred upon the faith thereof.

But in truth the whole evidence does not warrant us in finding that Gildemeister ever agreed that it might be applied to any other debt, or that the plaintiff received it upon that understanding, or condition, or that the defendants sanctioned such an application of it.

It is strenuously insisted that the payment of the \$2,000 note, by the defendants themselves, pursuant to their arrangement with Ryder and Malony, was a voluntary payment to the use of the plaintiff, which placed the whole of the money at his free disposal, to be applied, if he thought proper, to the note he had endorsed and procured to be discounted for Gildemeister and Neustaedter.

The payment ought not to be so regarded. It was according to the intention of the parties, when the note was delivered (as security for the note in suit), that it would and should be paid at maturity. It was according to the natural, usual, and

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regular course of business, that it should be so paid. The payment was in discharge of an express understanding with Ryder and Malony, that the defendants would pay it, and restore it to them. It was, therefore, their duty to pay it, as they did, without involving Ryder and Malony in any question or controversy on the subject.

The utmost that can reasonably be inferred from what may properly be regarded as a consent that the plaintiff credit the proceeds is, that he was to retain them until the note in suit became due. This is entirely consistent with the testimony of Gildemeister, and with the other evidence that the Ryder and Malony note was received by the plaintiff as collateral security for the note in suit only, and, when so understood, it was proper, and in accordance with an honorable regard to that understanding, for the defendants to pay in the money, as it was upon other grounds, above suggested, their duty to do.

It follows, from these views, that the plaintiff has not only been paid the amount of the note in suit, but he has also received the difference between the amount of that note, \$1,288 27, and \$2,000, which difference is the defendants' money. This difference they demand, by way of counter-claim, in this action, and should be allowed to recover.

It seems to us, that under the view we have taken of the facts proved, there are no legal principles involved in regard to which there is doubt, or respecting which there was any difference between the counsel on the argument. It was rather the application of obvious and well settled rules, to the proofs, that was the subject of contention.

That, Gildemeister had no right to appropriate the note to his own debt, even if he attempted to do so, is quite clear, and that the plaintiff taking it in fraud of the defendants' rights, could only claim to the extent of his advances upon the faith thereof, is not, since the case of *Stalker v. McDonald*, 6 Hill 93, open to discussion.

And, on the other hand, that money voluntarily paid to one who claims a right to receive it for his own use, and paid with knowledge of all the material facts, cannot be recovered back, is equally well settled. The cases cited by the plaintiff's counsel are full to that effect.

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But in our judgment the facts proved in this case do not admit of the application of this latter principle.

Our conclusion is, that the defendants should have judgment for the sum of \$716 73, with interest from the time of the application of the money, May 24th, 1854, with the costs of the suit.

CHARLES A. MANNING v. PATRICK MONAGHAN, JOHN CAVANAGH, LEONARD GOSLING, and EDWARD SCHENCK.

A Receiver, under supplementary proceedings, as a general rule, has no right to take possession of and sell the goods and chattels of the debtor which he knows are covered by a prior mortgage, unless he can show that, as against the judgment-creditor, the mortgage was fraudulent and void.

If, by the terms of the mortgage, the debtor has a temporary right of possession, the Receiver, if authorized to sell at all, must limit the sale to such temporary right, and is bound to declare, that it is made subject to the mortgage.

Nor has he any right, in such a case, to sell the mortgaged property in parcels, but is bound to sell the whole together, so as to enable the mortgagee to follow it in the hands of the purchaser.

Where the Receiver makes the sale unlawfully, he is liable to the mortgagee for the amount of the mortgage debt and interest, provided such was the value of the mortgaged property; and in case he acts with the knowledge and by the direction of the plaintiff in the suit in which he was appointed, such plaintiff is equally liable. It is doubtful whether a Receiver can sell mortgaged property at all, unless by an express order of the Court appointing him.

When mortgaged goods are unlawfully sold by a Receiver, a purchaser who has no knowledge, actual or constructive, of the mortgage, as a *bond fide* purchaser is not liable to the mortgagee. See note †, *post*, p. 467.

Judgment against defendants Monaghan and Cavanagh. Complaint dismissed as to the defendant Gosling.

(Before DUER, SLOSSON, and WOODRUFF, J.J.)

Heard, April 6; decided, June 20, 1857.

THIS action comes before the Court at General Term, on questions of law arising at the trial, and which were there ordered to be heard, in the first instance, at General Term. It was tried in November, 1856, before Mr. Justice BOSWORTH and a jury. It was brought by Charles A. Manning, as plaintiff, against Patrick Monaghan, John Cavanagh, Leonard Gosling, and Edward Schenck, as defendants.

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The complaint avers that the plaintiff, on the 5th of October, 1854, loaned \$1,000 to the defendant Schenck for one year, and took his note of that date, payable one year thereafter, for \$1,070, and a chattel mortgage, executed by Schenck, upon his household furniture, as security for the payment of such note, which mortgage was duly filed on the 11th of October, 1854.

That on the 5th and 8th of October, 1855, when the note became due, the plaintiff demanded payment of Schenck, who was then and since has been insolvent, and who did not then pay, and since then has not paid any part of it. He then demanded of Schenck the mortgaged property, and found that the other defendants had seized said goods, in payment of a claim due them, or to one of them, from Schenck. That said other defendants, in the spring of 1855, seized said goods, then being in the possession of Schenck, and sold the same to divers persons unknown to the plaintiff, received the price thereof to their own use, and that they refuse to pay it to the plaintiff, or to give to him the possession of the goods, and that Gosling claims to have bought some of said goods from the other defendants, and refuses to give up possession of them.

That, prior to such seizure and sale, the defendants knew of the plaintiff's rights as such mortgagee, and in defiance thereof, did the acts before stated, and "have thereby deprived the plaintiff of all security for his said money, and of all power to obtain possession of said goods, or to sell the same, or to cause the same to be applied, in any manner, to the payment of said note, which is wholly due and unpaid." It states a demand made upon Monaghan, Cavanagh and Gosling for the goods, and a refusal by them to deliver any part of the same, and that the plaintiff, in "consequence of the unlawful acts of, (Monaghan, Cavanagh, and Gosling,) has thereby sustained loss to the full amount of \$1,070, besides interest, since the 8th of October, 1855," for which sum it "prays judgment against the defendants."

Monaghan, Cavanagh and Gosling put in separate answers. The printed case does not show that Schenck put in an answer, nor whether he had been served with the summons. The contents of the answers interposed by the other defendants, are not stated, as no question arose upon them.

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The material facts, proved on the trial, exclusive of those found by the jury, are as follows, viz:

"The plaintiff held a chattel mortgage executed by Schenck for \$1000, dated the 5th day of October, 1854, and payable at the expiration of one year with interest, the mortgage was upon furniture in Schenck's house. It was duly filed on the 11th day of October, 1854, but a copy of the mortgage and a statement of the mortgagee's interest were not filed within the year after the first filing, pursuant to the statute, nor were they filed at all. The mortgage was executed to secure the payment of a note, of the same date as the mortgage, for \$1,070, payable one year after its date, and given by Schenck, for money lent to him, by the plaintiff.

On the 27th day of November, 1854, Monaghan recovered a judgment in the Marine Court against Schenck for \$492 on which an execution was issued, after a transcript of such judgment had been filed and the judgment docketed in the office of the clerk of the city and county of New York.

No levy however was made on this property, but the execution was returned unsatisfied, and supplementary proceedings were thereupon instituted, under which Cavanagh was appointed a receiver of Schenck's property.

Cavanagh, as receiver, applied to a judge of the Court of Common Pleas for an order, directing Schenck to show cause why he should not deliver to him the mortgaged property, at the return of which Schenck appeared by counsel, but the Judge refused to make the order for such delivery. Cavanagh thereupon, at the instance and by the direction of Monaghan, forcibly took the property, embraced in the mortgage, (with other property) from Schenck's house, in his absence, and without his consent.

This was in February, long before the mortgage fell due.

Manning thereupon immediately applied to a Judge of the Court of Common Pleas, of the city and county of New York, and obtained an order that the receiver show cause why the property should not be returned to Schenck or to Manning, and in the mean time, and until the final disposition of the motion, the receiver was restrained from selling or disposing of it.

This order was returnable on the 3d day of March.

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Cavanagh appeared by attorney at the return of the order, and the motion was adjourned to the 7th day of March, and afterwards to the 10th day of March.

Between these two dates a consent was drawn up, by the counsel of Monaghan and Cavanagh, and handed to the counsel of Manning, assenting to the sale of the property, &c., the proceeds to be deposited, to abide the order of the Court. It was signed by Manning, but not by the defendants, or either of them, and it never was delivered, or exchanged between the parties.

No further hearing was had in respect to the injunction, and no further order made thereon.

The property when taken from Schenck was removed to an auction store, in Canal street, and there retained until the 21st day of April, when it was taken to the auction store of Mr. Irving, in Pine street, where it was sold at public auction with a variety of other property. The property mortgaged, produced at such auction sale the sum of \$674.44 over and above all expenses of the sale and all charges of the receiver in relation to such property.

Gosling became a purchaser, at this sale, of a portion of the property and paid for it.

When the note, which the mortgage was made to secure, fell due, Schenck was insolvent, and since then has been insolvent.

When Monaghan and Cavanagh took the property they had notice of the mortgage and of the plaintiff's claim, and had a copy of the mortgage with them, and Cavanagh acted under the direction of Monaghan.

The only demand, made by the plaintiff of Gosling, that he should give up the possession of the goods he bought, was made in January, 1856.

The Judge submitted certain questions, in writing, to the jury to be answered by them, saying that he should order the legal questions which might arise on such special verdict, and upon the facts proved, which were not the subject of dispute, and upon such exceptions as were taken to the decisions of the Court on said trial, to be heard, in the first instance, at the General Term.

The questions, so submitted, and the answers of the jury thereto, are as follows, viz:

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1st Q. Was the mortgage in question, which was executed by Schenck to Manning, made in good faith, and without any intent to hinder, delay or defraud the creditors of Schenck?

A. Yes.

2d Q. What was the fair value of the mortgaged property taken by Cavanagh at the time it was removed from Schenck's house by Cavanagh?

A. Twelve hundred dollars.

3d Q. How much would its value be depreciated by a careful use of it, as it is customary to use such property, between the time Cavanagh took it and the 8th of October, 1855?

A. Seventy-five dollars.

4th Q. Was the property damaged between the time Cavanagh took it and its sale by Irving, in consequence of any misuse of it, or a failure to take proper care of it by Cavanagh or his agents?

A. Yes.

Q. If it was so damaged, to what amount?

A. Two hundred dollars.

5th Q. If it was so damaged, was the misuse or failure to take care of it, caused by the conduct of Cavanagh acting solely upon his own sense of duty as receiver, or by conduct of Cavanagh caused by his acting in pursuance of and in conformity with the requests or directions of Monaghan?

A. By directions of Monaghan.

6th Q. Did the plaintiff consent that the receiver Cavanagh might sell the mortgaged property free and discharged from the lien of his mortgage and all claims under it?

A. No.

7th Q. What was the fair value of that part of the mortgaged property bought by Mr. Gosling at the time he bought it?

A. One hundred and forty-three dollars and twenty-five cents.

8th Q. How much would a careful use of it, (as it is customary to use such property), up to the 8th of October 1855, depreciate such value.

A. Twenty dollars.

9th Q. Had Mr. Gosling any knowledge or notice before he paid for the property bought by him of the existence of the mortgage in question?

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A. No.

10th Q. How much has Monaghan received as and from the proceeds of the sale of the mortgaged property, over and above the amount of his judgment and interest thereon and expenses of the receiver in relation to such property?

A. One hundred and thirty-four dollars and twenty-two cents.

The Court thereupon directed the questions of law arising in the case to be heard in the first instance at the General Term, that judgment be there applied for in the first instance, and that the entry of judgment in the meantime be suspended."

On the 6th of April, 1857, the plaintiff moved the Court, at General Term, for judgment for the amount of his claim, secured by the said mortgage.

Edwards Pierrepont, for the plaintiff.

F. Byrne, for defendants, Monaghan and Cavanagh.

J. Dimmick, for defendant, Gosling.

BY THE COURT. SLOSSON, J.—Unless the receiver in the present case stands in the position in which the Sheriff would have stood, had he levied upon, taken possession of and sold the property under an execution, his sale, especially in the manner in which it was conducted, was a wrongful act, to the injury of the rights of the plaintiff, and for which both he and Monaghan are liable as trespassers.

In the case of *Hull v. Carnley*, (1 Kernan's Rep. 501,) on which these defendants rely, the complaint was that the Sheriff by levying upon and taking the property in the hands of the mortgagor, who was in possession under a similar license or authority to that contained in the mortgage in the present case, and by selling it without referring to, or recognizing the plaintiff's lien on it by virtue of the mortgage, had illegally deprived the plaintiff of its possession. The property, (in that case,) was sold all together, and no injury was shown to have accrued to the property itself. The Court held, that as the mortgagee, the plaintiff had, at the time of the levy, taking and sale, no right of possession, no injury was done to the plaintiff by the act of the

Sheriff, and that he was justified in what he did by his process, and this, notwithstanding the Sheriff had full notice of the existence of the mortgage, and that nothing had been paid on it.

In the case at bar, the receiver after the refusal of the Judge to grant an order directing Schenck to deliver over the property to him, forcibly, and without Schenck's consent, and in his absence, took it away from his dwelling house, and afterwards, and while an injunction against its sale was pending, and unrevo-
ked, sold it at public auction, in parcels, to different parties, at a sale where other articles were also sold indiscriminately with them, and without giving any notice of the mortgage, or of the nature of the interest which he was selling, though he had full knowledge of the mortgage and its contents. He not only acted, without any authority from the Court which had appointed him, but in express violation of its order. His office clothed him with no such power.

Strictly, the act of taking and selling was not an injury to the plaintiff's right of possession, for at that time he had no such right, and could not then have maintained trover for the property, whatever right, if any, Schenck might, under the circumstances, have had to such an action. But the receiver had no right to sell more than Schenck's temporary right of possession, if he had any right to sell at all, and he was bound to sell the property all together, so that when the mortgage fell due, the plaintiff might, if his debt was not paid, find the property and take possession of it.

If he had a right to take the property, he could not lawfully do anything with it, which should defeat or impair this ultimate right of the plaintiff.

But in truth, the taking and sale were both unjustified, and as respects the receiver, wholly illegal and void, as against the plaintiff. The receiver acted on his own motion, under direction of Monaghan throughout, and the consequence of his acts to the plaintiff, has been the loss of his security under the mortgage.

What would have been the Receiver's position had he acted under the authority of the Court, it is needless to enquire. It is enough for the present case to know that he acted not only without such authority, but in express violation of an order of the

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Court which had enjoined him from selling. He has no such justification of process, as the Sheriff had in the Hull and Carnley case.

The action is not brought for an injury to a right of possession in the plaintiff at the time the property was taken and sold, but to recover damages for the illegal and wrongful act of the Receiver and Monaghan, in taking and selling the property without reference to or recognition of his rights under the mortgage, in consequence whereof he has lost his security.

If the Receiver can in any sense be said to be justified in taking the property, he was bound to keep it until the mortgage became due, or if he sold it, to sell only the right of Schenck in it, which was a mere right of temporary possession, with an equity of redemption. He could have or acquire no better or greater right in the property than Schenck had, and is as much a trespasser as Schenck would have been, had he then undertaken to sell the property in parcels and appropriate the proceeds.

We are clearly of opinion that the plaintiff is entitled to recover against these defendants, as damages, the full face of his mortgage and interest, with interest on the aggregate amount from the time it became due.

In respect to the defendant Gosling, the only demand made of him for the delivery of the property purchased by him was made in January, 1856, some three months after the mortgage fell due.

Gosling was a *bond fide* purchaser without notice of the existence of the mortgage.

It is contended, on his behalf, on the strength of *Gregory v. Thomas* (20 Wendell Rep. 17), that as a copy of the mortgage was not refiled within the 30 days before the expiration of the year after the first filing, which was on the 11th day of October, 1854, the mortgage as against him had ceased to be valid. (2 R. S. 136, marg. § 11.)

In the case relied upon, a first mortgagee who had neglected to refile his mortgage, took possession of the property some three months after his mortgage fell due, and the Court held that his mortgage would have been void as against the plaintiff who was a subsequent mortgagee of the same property if it had not been proved, that when he took his mortgage, he had actual notice of the existence of the first (defendant's) mortgage, and the Court

held by reason of such actual notice he was not a subsequent mortgagee "in good faith" within the meaning of the Statute.

In the present case Gosling was a purchaser without notice, and therefore a purchaser "in good faith," and I do not see why the principle of that decision does not fully protect him, unless the fact that in that case the goods when taken were in the actual possession of the mortgagor and had been so for the whole period after the mortgage fell due, and in the case at bar, the property had been long taken from the mortgagor's possession, shall be held to constitute a controlling difference.

The statute (section 9,) requires the mortgage to be filed in all cases where the property remains in the hands of the mortgagor, as was the case in the present instance.

Section 11 provides, that "every mortgage filed in pursuance of this act shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of said term of one year a true copy," &c., be again filed, &c.

The necessity for the original filing having once existed, and the mortgage, in consequence, having once been filed, I do not see how we can hold that the fact, that before the year expires the property has been taken from the possession of the mortgagor, relieves the mortgagee from the necessity of refiling a copy, if he wishes to retain his lien as against a subsequent purchaser or mortgagee without violating the letter of the statute.*

We think therefore that as against Gosling the complaint should be dismissed, and judgment rendered in his favor.†

* Was the mortgage void as against Gosling, merely because it was not refilled within thirty days before the expiration of a year from the filing thereof, with such a statement as the statute prescribes? Must he not have been a purchaser *after* the expiration of the time for the refiling of the mortgage, to enable him to say it had become void as to him, as a subsequent purchaser in good faith? Does not the word "subsequent," as used in the act of 1833, p. 402, mean subsequent to the time when the mortgage should have been *refiled*? See *Meech et al. v. Patchin*, 14 New York R. 71.

† At the November General Term, 1857, on the authority of the decision in this case, it was also held by this Court in *Goulet v. Asseler & Meyer*, that a sale of per-

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Judgment was ordered in favor of the plaintiff against the defendants, Monaghan & Cavanagh, and the complaint, as to the defendant Goaling, was dismissed.

sonal property, covered by a valid chattel mortgage, in parcels, out and out, to different purchasers, in disregard of the mortgagee's right, subjected the execution creditor of the mortgagor, by whose direction such sale was made, in an action by the mortgagee brought after the mortgage became due, to damages equal to the value of the property, less such deduction for its use during the time the mortgagor had a right to possess and enjoy it, as was just. In the opinion delivered in that case, *Fenn et al. v. Bittleston et al.*, 8 Eng. L. and Eq. 483, was cited as a case in point, and appears to be a decision of the precise question. Since then *Hull v. Carnley*, after a second trial had in this Court, has been a second time before the Court of Appeals. (17 N. Y. R. 202.)

On the second trial it was proved, that although the Sheriff sold the property in parcels and absolutely, instead of merely selling the mortgagor's interest, it was all sold to one person, and it appeared that all of the property was in the possession of the mortgagor when the action was commenced, he having hired the use of it from the purchaser.

The Court of Appeals held that the Sheriff was not liable as a trespasser for seizing the property, nor for a conversion of it, although he sold it absolutely in parcels, on the ground that, at the time of such seizure and sale the mortgagee was neither in possession nor entitled to the possession of the property. The opinion of the Court concludes thus: "We would not be deemed as holding, at this time, that a mortgagee has any action at law against the Sheriff, in such case, but if he has any, it would be for consequential damages for the injury to his lien; and if such an action had been brought it could not have been maintained in this case, for the reason that, although sold in parcels, it was all bid in by one man, and remained in the possession of the mortgagor at the time of the commencement of this suit. It is manifest, therefore, that he sustained no actual damage."—*Id.* 204-205.

Whether a mortgagee, who has been wholly deprived of his security by reason of a sale and delivery of the mortgaged property to different purchasers, under such circumstances that the mortgagee is unable to find it, and compel its application to the payment of the mortgage debt, is a question that may be regarded as not affected by the decision last made by the Court of Appeals, in *Hull v. Carnley* (17 N. Y. R. 202).

And the question remains, whether Cavanagh, as receiver, considering the circumstances under which he seized and sold the property, is entitled to the protection which the law extends to a Sheriff in executing a valid process, which it is his duty to execute?

The question of Cavanagh's liability to the mortgagee, for impairing the value of his security by an abuse of the mortgaged property, is not affected by the decision in *Hull v. Carnley*. Whether Monaghan, or Cavanagh, as against the plaintiff, can, in any event, retain the excess for which the property was sold, over and above the amount of Monaghan's judgment against Schenck, may be a question of some importance, when properly presented for the judgment of the Court.

**SETH GROSVENOR v. THE ATLANTIC FIRE INSURANCE
COMPANY OF BROOKLYN.**

Eugene W. McCarty, being the owner of a dwelling house, (covered by a mortgage owned by the plaintiff,) insured the same against loss by fire; the loss, if any, being, by the terms of the policy, made payable to "Seth Grosvenor" (the plaintiff), "mortgagee." In an action by the plaintiff upon the policy, this Court, holding in obedience to *The Traders' Ins. Co. v. Robert*, and to *Tillou v. Kingston Mfg. Ins. Co.* that, no acts of the mortgagor, done after the issuing of the policy, could affect the rights of the mortgagee under it, or to recover upon it; also held, that the admission of evidence that, when the defendants were applied to, to issue the policy, they were told that the interest of the mortgagee was to be insured, and they advised, as the best mode, the insertion of his name in the policy, as it was done; could not prejudice the defendants, and was not, therefore, an error entitling them to a new trial: The mortgage, owned by the plaintiff, being one that the insured had executed to E. Kellogg, and the latter had assigned to the plaintiff, at the same time guaranteeing its payment; it was also held that Kellogg was, under the code, a competent witness for the plaintiff: The action cannot, by reason of Kellogg having given such a guaranty to the plaintiff, be said to be prosecuted for the immediate benefit of Kellogg. At most, he is merely interested in the result.

The fact, that the mortgage has been foreclosed, and the mortgaged property sold, and a part of the mortgage debt thereby paid, cannot be made available to the insurer, as a partial defence to an action on the policy, when no such defence is set up in his answer.

(Before BOSWORTH and WOODRUFF, J.J.)

Heard, June 2; decided, June 27, 1857.

THIS action comes before the Court, at General Term, on a verdict for the plaintiff, taken subject to the opinion of the Court, on a question of law, arising at the trial, and there directed to be heard at the General Term, in the first instance. It was tried before Mr. Justice BOSWORTH and a jury, on the 6th of November, 1856.

The complaint states, that the defendants, by a policy, dated the 14th of November, 1853, for a certain premium paid by, or on behalf of the plaintiff, insured the plaintiff as mortgagee, against loss or damage by fire, on a three story brick dwelling house, (described in the complaint,) for one year, from the date of the policy, to the amount of \$7,000; the destruction of the

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building by fire, on the 24th of February, 1854; that at the time the policy was executed, and at the time of the fire, there was due to the plaintiff as mortgagee, \$6,250, with interest thereon from the 1st of November, 1853: that notice, in writing, of such loss by fire, was given to the defendants as soon as possible, to wit on the 10th of March, 1854, with the proper preliminary proofs required by the policy; and also avers due performance by the plaintiff of all the conditions on his part, contained in the policy, wherefore, as it alleges, the defendants became liable to pay to the plaintiff the said sum so due to him as such mortgagee.

The complaint then states, that the defendants, by their policy, dated on the 14th of November, 1853, for a certain premium paid, did "insure Eugene W. McCarty upon his three story brick dwelling house," &c., against loss or damage by fire, to the amount of \$7,000.

That McCarty on the day of the date of the policy, to secure the plaintiff the payment of the money due on a mortgage of the premises, made by McCarty, and a bond accompanying the same, then held and owned by the plaintiff, did, by, and with the consent of the defendants, assign the policy to the plaintiff, and direct that the money, payable in case of any loss under the policy, should be paid to the plaintiff. It then states, as before, the total destruction of the building by fire, the like amount to be due to the plaintiff as mortgagee, notice of the loss, and service of preliminary proofs, and due performance by him of the conditions on his part pursuant to the requirements of the policy, whereby the defendants became liable, to pay to him, on the 11th of May, 1854, \$6,388 15, and prays judgment for that amount, with interest from that date.

The answer denies that, the defendants insured the plaintiff as mortgagee, or that he was ever mortgagee of said premises, or that they are indebted to him, in any sum whatever. It then admits that they insured McCarty as alleged, and puts at issue the allegations that he assigned the policy to the plaintiff, or that they consented to any such assignment, and avers that, if it was assigned; that fact, by the terms of the policy, avoids it. It avers that no proofs of loss were ever served on them by McCarty, that this was required by the policy, even though he

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had assigned it; also, that McCarty, before the fire, sold and conveyed all his interest in the premises, to D. A. Bostwick, without the consent of the defendants, and thereby avoided the policy. That, although the policy was issued to the said Eugene, yet he was only a trustee of one John McCarty, in regard to the policy and the building thereby insured, and that John McCarty was the real owner thereof, and caused that policy with five other policies, on the adjoining buildings, to be issued in the name of Eugene, but fraudulently, for his own benefit; and that, with intent to defraud, he also caused all the said buildings to be mortgaged to divers persons for sums exceeding their value, and the said buildings to be further insured for large amounts by other Insurance Companies, and to amounts far exceeding their value, to cover last said mortgages, in addition to the said \$7,000, so insured by these defendants, well knowing that the buildings were not worth near the sum for which they were so insured or mortgaged.

Also, that he caused said buildings, including those referred to in the complaint, to be set on fire and consumed, that he might falsely and fraudulently claim the said insurance for his own benefit or to pay said mortgages, and that while the title stood in the name of Eugene, and afterwards in the name of Bostwick, the said John was largely interested therein, and by his said fraudulent acts, he, and Eugene, and the plaintiff have forfeited all claims to indemnity under either of said policies.

On the trial, the plaintiff's counsel offered to read in evidence a policy of insurance executed by the defendant in favor of Eugene W. McCarty, dated November 1st, 1853. The defendants' counsel objected thereto, on the ground that it was no evidence of a contract between the plaintiff and the defendants in this action. The said justice overruled the objection, and the defendants' counsel excepted to such ruling.

The said policy was then read in evidence, and commences as follows:

"By this policy of insurance, the Atlantic Fire Insurance Company of Brooklyn, in consideration of thirty-two dollars to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure Eugene W. McCarty against loss or damage by fire, to the amount of seven thousand dollars,

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on his three story brick house, with metal roof, &c., loss, if any, payable to Seth Grosvenor, mortgagee."

The plaintiff's counsel next put in evidence certain preliminary proofs of loss, required by the policy, and made by the plaintiff: The defendants' counsel admitted that said proofs, with notice of a loss, had been served on the company on the 8th of March, 1854, and also that the premises had been partially consumed by fire on the 24th day of January, 1854, but objected to the admissibility of such proofs as evidence in this action, inasmuch as they had not been made by Eugene W. McCarty, with whom alone the contract of insurance was made. The justice overruled this objection, and the defendants' counsel excepted to his ruling. The said proofs were then read, in evidence.

The preliminary proofs stated, *inter alia*, that the insured premises were mortgaged by Eugene W. McCarty, and wife, to Edward Kellogg, by three several mortgages, each dated November 1, 1853, and conditioned to pay \$6250, with interest, at seven per cent., and that Kellogg assigned said mortgages to the plaintiff on the day of their date, and guaranteed the payment of the amounts secured thereby.

The plaintiff's counsel next read in evidence the bond and mortgage on the premises, made by McCarty and wife to Edward Kellogg, for \$6250, dated 1st November, 1853, together with an assignment of the same to the plaintiff, bearing the same date, containing a guarantee by said Kellogg of the payment of said principal and interest, according to the condition of the said bond and mortgage; and then called as a witness:

Edward Kellogg, who being sworn, said, he was the assignor of the bond and mortgage in question; that at the time the policy was taken out, the bond and mortgage had been assigned to the plaintiff, and the witness effected the insurance at McCarty's request; and stated to the company that the plaintiff held the mortgage, and that his interest was to be insured; and the company advised, that the best way was to put his name in the policy, as was done, instead of the more formal mode of assignment.

The defendants' counsel duly objected to all evidence of this witness's statements to the company, and of the company's advice

to him; but the Justice overruled the objection; and the defendants' counsel excepted.

This witness further said, he had guaranteed the payment of the said bond and mortgage, and had received the consideration of the assignment from the plaintiff at various times, but had not received more than two-thirds of it at the date of the assignment; but that before the assignment was delivered by him, which was on or about the 14th November, 1853, he had had a settlement with the plaintiff, and received the whole of the said consideration. The mortgage has since been foreclosed with two other mortgages on adjoining property, and that he had purchased in the whole of the three lots; and the net proceeds of the sale were \$4854 13; that he had not paid any of the purchase money, but had settled with the plaintiff for it by giving him other securities; that this suit is carried on by the plaintiff, but if he collects the money, he supposes it will go to the benefit of witness; he has had no understanding with the plaintiff as to prosecuting it; the plaintiff would have brought the suit any way.

The defendants' counsel then moved to strike out the testimony of this witness, forasmuch as it appeared that the action was prosecuted for his benefit; and the Justice overruled the motion; and the defendants' counsel excepted to such ruling.

The plaintiff's counsel then offered testimony tending to show that it would require from 5000 to 6000 dollars to repair the damage done to the premises by the fire, and rested.

The defendants' counsel then moved to dismiss the complaint on the grounds:

1st. That the facts of the case, as shown by the plaintiff, do not constitute a cause of action against the defendants; the plaintiff having failed to prove an insurance to himself of the mortgage interest stated in the complaint.

2d. That there was no sufficient proof of any money due on the mortgage, or to the plaintiff as assignee of the mortgage.

3d. That there is no proof that Eugene W. McCarty had any interest in the insured property at the time of the loss, nor that he had sustained any injury by the fire, nor had he ever made or presented any proof of loss.

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4th. That the mortgage interest of the plaintiff had been paid by the foreclosure of the mortgage and sale of the property, and the payment to him of the amount of the substituted securities.

But the said Justice overruled the defendants' objections, and refused to dismiss the complaint; to which the defendants' counsel excepted.

The defendants' counsel then offered to prove, and the plaintiffs' counsel admitted it to be true, that in January, 1854, one month before the fire, Eugene W. McCarty, the person named in the policy as the insured, sold and conveyed the property referred to in the policy, to one David A. Bostwick.

The said Justice ruled such evidence inadmissible; to which ruling the defendants' counsel excepted.

The defendants' counsel next offered to show, that the property, when insured, and at the time of the fire, actually belonged to one John McCarty, for whom Eugene W. McCarty held the title, and that he combined with said Eugene, and with said Bostwick, and wilfully caused the said premises to be set on fire, for the purpose of defrauding the defendants, and of obtaining the insurance money in this action; and that this was the fire which caused the loss now claimed.

The said Justice ruled such evidence inadmissible; to which the defendants' counsel excepted.

The defendants' counsel then offered evidence tending to show that the premises injured by the fire could be repaired and put in as good condition as they were before the fire, for from \$3,500 to \$3,750, and rested.

The defendants' counsel then requested the said Justice to charge the jury, that from the amount of damage by fire, which they might find the plaintiff entitled to recover, the defendants were to be allowed a deduction of one-third of the net proceeds of the sales on the foreclosure of the mortgage. The Justice declined so to charge, but said he would reserve that question for the determination of the Court at General Term, and it was accordingly reserved.

The Justice thereupon charged the jury, that the plaintiff was entitled to recover an amount sufficient to make good the total loss or damage he had sustained by fire, which was what it would

cost to replace the building in the same condition it was in before the fire, with interest after the expiration of 60 days from the time the proofs of loss had been served on the company; and that the jury would not allow the defendants any deduction for the proceeds of the mortgage sale received by the plaintiff.

To which charge of the said Justice, and every part thereof, the defendants' counsel excepted; and the jury thereupon found a verdict of \$8,168 70 for the plaintiff, subject to the opinion of the Court at General Term, whether the defendants were to be allowed a deduction by reason of the sale of the lot covered by said mortgage, upon a case to be made; with liberty to either party to turn the case into a bill of exceptions.

Daniel Lord and *R. Goodman*, for the plaintiff, moved for judgment on the verdict, and argued the following point:

The defendants are not entitled to deduct the proceeds of the foreclosure sale of the lots.

1. No such defence is set up in the answer.
2. As between the mortgagee plaintiff and the company defendants, the former is entitled to receive the whole amount of the damages.
3. There is no evidence that the damages recovered and the net proceeds of the lot, would exceed the amount due.
4. If there had been, still the defendants would be bound to pay the plaintiff his damages, and their only remedy for any surplus is an action by way of subrogation to the mortgagee's claim, to which *McCarty*, the assured, should be a party.

Wm. Curtis Noyes and *John N. Taylor*, for the defendants, made and argued the following points:

I. The first, second and third points on the motion to dismiss the complaint, having been ruled against the defendants, on the decision of a prior cause between these parties, they are only renewed on this argument, in order to preserve the right to present them to the Court of Appeals, should the same become necessary.

II. The evidence of *Edward Kellogg*, to show by parol what the understanding or agreement was, when the policy sued upon was applied for, to control its plain, written language, was wholly

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inadmissible. (Greenl. Ev. §§ 275, 281; 2 Arnould, 1316, § 462; *Bell v. West. Mar. & F. Ins. Co.*, 5 Rob. La. R. 423.)

III. Kellogg was an incompetent witness, the action being prosecuted for his "immediate benefit." (Code, § 389, sub. 1; *Howland v. Willets*, Ct. Ap. 1 Duer, 325; *Cutlin v. Hanson*, *Id.* 309; *St. John v. Am. M. Ins. Co.*, 2 *Id.* 419.

IV. In any event, the defendants were entitled to have one-third of the price for which the premises sold, on the foreclosure, being \$4,854 13, deducted from the amount of the verdict.

1. The plaintiff, as mortgagee, could only insure his mortgage interest; else the policy would be a wager policy and void. (*St. John v. Am. M. Ins. Co.*, 2 Duer, 419; *Parsons' Mer. Law*, 412-13; *Buchanan v. Ocean Ins. Co.*, 6 Cow. 318; 1 R. S. 662, §§ 8, 9, 10; 1 Arnould on Ins. 251-2.)

2. The legal effect of the policy (as declared by this Court in the preceding case) is, that the lien created on the premises by the mortgage, is insured, that being the only interest which the plaintiff had in the premises, and the only proper subject of insurance.

3. Prior to the case of *King v. The State Mutual Ins. Co.* (7 Cush. 1), it was the settled law in Massachusetts, and in this State, as well as in England, that on the underwriters paying the loss on a policy insuring such an interest, they were entitled to be subrogated to the mortgage, or other security of a similar character, and such is still the law; that case being opposed to sound principle, to well considered adjudications, and to the elementary works. (2 Phil. on Ins. 8d Ed. § 1712; *Parsons on Mer. Law*, 412-13, 443, 535; *Carpenter v. Wash. Ins. Co.*, 16 Peters, 495; *Tyler v. Aetna Ins. Co.*, 12 Wend. 507; S. C. 16; *Id.* 385, 399; *Atlantic Ins. Co. v. Storrow*, 5 Paige R. 285, 290, 294; *Hart v. Western R. R. Cor.*, 13 Met. 99; 22 Eng. Law & Eq. 73.)

BY THE COURT. BOSWORTH, J.—The decision of the General Term, in April, 1853, made in an action between the parties to the one now before us, has disposed of most of the questions presented by this appeal, 5 Duer, 517.

That decision determines that the plaintiff can maintain this action, and that no acts of the mortgagee, subsequent to

the issuing of the policy, can affect the plaintiff's right to recover.

The exception to the testimony of Kellogg, in relation to the conversation between him and the company, at the time he applied for the policy, cannot be of any avail to the defendants.

The construction given to the policy, by the decision previously referred to, made it an insurance protecting the interest of the plaintiff, as mortgagee. If that is the legal effect of the policy, the testimony excepted to could not, possibly, have prejudiced the defendants in the decision, of any question, made by the Court, or submitted to the jury. This testimony established that the company had express notice at the time of issuing the policy, of the interest of the plaintiff, and that the insurance of his interest was an object sought to be secured by the policy which the company was solicited to issue. Although such notice cannot alter the clear meaning of any word contained in the policy, yet, the evidence places the Court in the position which the parties occupied at the time they contracted, and enables it to construe the policy, in the light of the facts and circumstances existing and present to the minds of the parties at the time it was made.

If the Court has not erred in its construction of the policy, the defendants have not been prejudiced by the decision admitting the evidence. A new trial cannot be granted, because such evidence was admitted.

The objection to the decision refusing to strike out the testimony of Kellogg, is not well taken. The action was not prosecuted for his immediate benefit, and mere interest in the event would not exclude him. It was not prosecuted for his "immediate benefit," within the meaning of those words as used in § 399 of the code.

Unless McCarty, whose bond and mortgage Kellogg had transferred to the plaintiff, with a guarantee of payment of the amount secured by them, had become irresponsible so that the amount could not be collected of him, Kellogg can hardly be said to be interested, in a legal sense, in the event of this action. There is no evidence that McCarty is unable to pay. If he has means sufficient to pay, which can be reached by due course of

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law, then Kellogg will sustain no actual loss, if the plaintiff should fail in this action.

It is not a case in which Kellogg has a right to receive the verdict if collected.

A recovery of it, and an application of it, upon the bond and mortgage assigned, will satisfy Kellogg's guaranty *pro tanto*, and extinguish, to a corresponding amount, the liability of McCarty. And Kellogg may be benefited by being saved the necessity of advancing the money to the plaintiff, and of then resorting to McCarty for reimbursement.

Buller v. Patterson, 8 Kern. 292, seems to approve of the decisions of this Court, which are cited in it, and which are sufficient to dispose of the question. (*Freeman v. Spalding*, 2 Kern. 878.)

Kellogg is not a witness who would gain, even indirectly, to the extent of the verdict, if the plaintiff recovered, and lose a corresponding amount if the plaintiff should be defeated. As the facts before us exhibit the witness, he was, at most, merely interested in the event, and his testimony could not be excluded on the ground on which its rejection was asked.

Neither is the defendant entitled to have one-third of the price, for which this and two other lots were sold on the foreclosure, deducted from the verdict.

It does not appear that the foreclosure occurred before this action was brought.

No such claim is set up in the answer.

It is not unreasonable to conclude, that the evidence in relation to the foreclosure of the mortgage was given to make such a case, as would show that Kellogg was an incompetent witness. Hence, when his testimony was concluded, the defendant moved that the whole of it be stricken out, "forasmuch, as it appeared, the action was prosecuted for his benefit." The facts proved in relation to the foreclosure of the mortgage, were not embraced within any issue made by the pleadings, and, therefore, cannot properly be made the basis of any affirmative or special relief Code, § 275.

Bruzill v. Isham and Earle, 2 Kern. 9.

If the defendants are entitled to all the security which the plaintiff holds, or to one third of the whole proceeds of the sale of the

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three lots, or to the proceeds of the sale of the lot on which the insured building stood, the nature and extent of the defendants' rights cannot be completely determined, except in an action to which Kellogg and McCarty are also parties.

But without placing our decision upon this ground, we think it sufficient to say that no deduction can be made in this action, for the reason that no such claim is asserted, or alluded to in the answer. It does not contain any allegations, which, if proved, would support such a claim.*

It is by no means clear that the Court, at the trial, could have ordered an amendment authorizing a new and distinct defence. It might amend so as to obviate such a variance between an allegation by which it was attempted to set up a defence, and the proof, as would not actually mislead the adverse party, to his prejudice, in maintaining his action. Code, § 169.

Facts constituting a distinct defence occurring after answer put in, or of which the defendant was then ignorant, should be set up by supplemental answer—on a motion, for that purpose. Code, § 177.

But permission to amend the answer was not asked.

We think the plaintiff should have judgment on the verdict.†

* *McKyring v. Bull*, 16 N. Y. R. 297.

† In a case between these parties, on a policy, in terms, like the one in question, decided in April, 1856, this Court held, that no discrimination could be made "between the rights of a mortgagee, situated, with respect to an insurer, as the present plaintiff is, and those of a mortgagee to whom a policy, in precisely the same words (with the exception of the words, 'loss, if any, payable to Seth Grosvenor, mortgagee,') has been assigned, with the express assent of the insurer, evidenced as the policy requires." 5 Duer, 517, 532, and 537, and id. 524-5.

This Court also held, that, inasmuch as it had been decided in *The Traders' Ins. Co. v. Robert*, 9 Wend. 404; and in *Tillot v. Kingston Mfg. Ins. Co.*, 1 Seld. 405, that, after such an assignment of a policy to a mortgagee, no subsequent acts of the mortgagor could operate to prevent a recovery upon the policy by the mortgagee, in case of a loss by the perils insured against; this plaintiff was entitled to the application of the same rule, and that his right to recover was not affected by any acts of the mortgagee subsequent to the issuing of the policy. The case, (reported in 5 Duer, 517,) was carried, by appeal, to the Court of Appeals, and decided by that Court at its June Term, 1858. 17 N. Y. 391.

That Court held, as this had, that no discrimination could be made between the rights of Grosvenor, and of Robert, as mortgagees. (17 N. Y. 395.)

But that Court being of the opinion, that *The Traders' Insurance Company v. Robert*,

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CLEU ET AL. v. MCPHERSON ET AL.

On the 7th of April, 1855, the plaintiffs, (then being in expectation of receiving a large quantity of French walnuts, by the ship, Helen E. Miller, which ship was, at that time, on her passage from Havre, in France, to the port of New York), contracted to sell to the defendants who agreed to buy, "twenty-five bales of French walnuts, at 7 cents per lb., to arrive per Helen E. Miller, less 3 per cent. cash."

Held, that said contract was executory, and that the plaintiffs, by its true import and meaning, undertook that, the walnuts should be merchantable, and in quality, substantially such, on their arrival and on the tender of them to the defendants, as are known in the trade, as French walnuts.

The jury having found, in answer to questions specially submitted to them, that, the walnuts in question, when they arrived and were tendered to the defendants, were not merchantable as French walnuts, and were then worth only two and one half cents per pound, and that the article known in the trade as French walnuts, in the condition in which they generally arrive in the New York market, were worth at the time of said arrival and tender, six and a half cents per pound, it was also *held* that, the defendants were under no obligation, by reason of their said contract, to receive and pay for the walnuts so tendered to them by the plaintiffs.

"was decided upon mistaken views of the law, applicable to the question involved, and that the decision of the Supreme Court never had the sanction of the Court for the Correction of Errors," and that the case of *Tillou v. The Kingston M^{rs}. Ins. Co.*, was determined by the Court of Appeals, "upon a misapprehension of what had been before adjudicated," (id. 400,) regarded the question as yet open for the consideration of that Court, and overruled those two decisions," and reversed the judgment of this Court which conformed to them: they being decisions, which it was the duty of the Court to follow.

In *The Buffalo Steam Engine Works v. The Sun Mutual Insurance Company*, 17 N. Y. R. 401, the Court of Appeals decided, that where a policy of insurance is assigned, with the consent of the insurer, to a mortgagee of the property insured, the assignee takes subject to the conditions imposed by the terms of the contract upon the person insured, and such assignee's right to recover, in case of a loss, is barred by a breach by the assignor of such conditions, subsequent to the assignment. That Court so held, where the owner of a vessel procured a marine policy upon her, the insurer knowing at the time that the owner was indebted to the plaintiff for an engine furnished the vessel; that he was to mortgage the vessel to secure such debt, and that his object in obtaining the policy was to assign it, as security for the debt. The policy contained permission to insure \$40,000, and to assign the policies. After assigning the policy, the mortgagor effected an over-insurance, and this was held fatal to a recovery by the assignee.

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The expressions, "The article undefined," "not defined," and "undetermined," commented on by HOFFMAN, J.

(Before DUEK, CH. J., & HOFFMAN, J.)

Heard, May 26; decided, July 11, 1857.

THIS action comes before the Court at General Term, pursuant to an order made at the trial thereof, that, the questions there arising, being questions of law, should be heard in the first instance, at the General Term, and the entry of judgment, in the mean time, be suspended. It was tried in June, 1856, before Mr. Justice BOSWORTH, and a jury. John F. Cleu & Ceasire Court, comprising the firm of J. F. Cleu & Co. are the plaintiffs, and Reuben McPherson, H. N. Eye, & J. C. Quick, composing the firm of McPherson & Co. are the defendants. Both firms resided and did business in the city of New York, when the contract in question was made, and it was made in that city.

The complaint states that on or about the 7th of April, 1855, "the plaintiffs, being in expectation of receiving a large quantity of French walnuts, by the ship, 'Helen E. Miller,' which was then on her passage from Havre, France, to the port of New York, at the special instance and request of the defendants, agreed to sell, and the said defendants then and there, in due form of law, and by a valid contract in writing agreed, in substance and effect, to purchase from the plaintiffs twenty-five bags of the French walnuts so expected to arrive as aforesaid, for the price or sum of seven cents for each and every pound of net weight contained in the said twenty-five bags; and did then and there agree to accept and receive the said walnuts upon the arrival thereof at New York, and to pay the plaintiffs for the same at the rate aforesaid, in cash upon delivery, deducting three per cent. from the amount of the bill."

It also states that the vessel arrived at New York with the said walnuts on board, on the 20th of April, 1855, and that the walnuts were landed and ready for delivery on the 27th of that month: a tender and offer to deliver 25 bags of said walnuts, and a demand of payment of the contract price, and the refusal of the defendants to receive the walnuts or pay for them: that they amounted at the contract price to \$174.03, and that on the defendants' refusal to accept, and pay for them, the wal-

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nuts were afterwards sold at public auction, on due notice to the defendants of such sale, for the net sum of \$57,62, and for the balance, being \$116,41, with interest from the 5th of May, 1855, the complaint prayed judgment.

The defendants, in their answer, say that, "they admit that the said plaintiffs agreed to sell to them, and that these defendants agreed to purchase, twenty-five bags of French walnuts, expected to arrive at the port of New York, for the price or sum of seven cents for each and every pound of net weight contained in the said twenty-five bags, and upon the arrival thereof at the port of New York to pay the price aforesaid, deducting three per cent. from the amount of the bill. But these defendants allege, that it was also then and there understood, expressed and agreed, that the said nuts were to be sound and merchantable, and if not found so to be, on the arrival thereof at New York, there was to be no sale of the same to these defendants, and they were not to accept the same, and the said agreement to purchase and sell were to be of no effect. And these defendants deny that there was any agreement or contract in writing for the sale or purchase of said nuts ever made by these defendants with the said plaintiffs, or that they ever agreed in writing in any form to purchase the same."

The answer further alleges that, the walnuts, so offered and tendered to the defendants, "were not sound and merchantable, but were unsound, damaged and injured, and were not according to the agreement made by the said plaintiffs with these defendants." It denies that anything was due to the plaintiffs from the defendants, and puts at issue the allegations, as to a sale at auction. As a separate defence, it alleges that, "no note or memorandum in writing was made of such contract, and subscribed by these defendants, or either of them; and that they did not receive or accept any part of the goods for which this action is brought, or pay any part of the purchase money; and that the said contract is void in law."

On these issues, the action was brought to trial.

On the trial, *Francis A. Paddock*, a witness for the plaintiff, testified, that he was one of the firm of "Bennett & Paddock," brokers, and that, in April, 1855, he "sold some French walnuts to the defendants, for the plaintiffs." Being shown a note of

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sale, which was produced by the defendants, he said, "This is one of the notes of that sale: one note of the sale was delivered to each of the parties." The note of sale so produced reads thus, viz.

"New York, April 7th, 1855.

"Sold for account of Messrs. J. F. Cleu & Co.,

"To Messrs. McPherson & Co.,

"Twenty-five bales French walnuts, at 7 c.

"To arrive per 'Helen E. Miller,' less 3 per cent. cash.

"BENNETT & PADDOCK, *Brokers*,

"100 Wall street."

He further testified thus: "I was employed by plaintiff to sell the nuts; I had no orders to buy for the defendants. I cannot state to which of the defendants the sale note was delivered." * * * *

"We sell fruit for the importers and call upon the buyers. I was employed by Cleu & Co., and called on the defendants; they agreed to buy the nuts, and the sale note was thereupon made out and delivered to the parties, in accordance with such agreement."

The defendants' counsel then asked the witness the following question:

Please relate the whole conversation between you and McPherson & Co., when you offered the nuts for sale. The plaintiffs' counsel objected to this evidence. The defendants' counsel stated that it was offered for the purpose of proving that the witness acted only as the agent of the plaintiffs, and also for the purpose of proving that the witness represented the nuts to be of a good and merchantable quality, and in a good condition; to which question plaintiffs' counsel objected, on the ground that the witness was in law the agent of both parties, and also upon the ground that the contract being in writing, parol evidence was inadmissible to vary or contradict the written contract.

The Court overruled the objection, and decided that it would hear evidence upon the question of the agency of the witness, and the nature of it; and admitted the question; to which

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decision and ruling the plaintiffs' counsel duly excepted. The witness, in answer to said question, further testified as follows:

"I told McPherson & Co. that I had some nuts for sale for Cleu & Co., and that I was authorized to sell them; I stated the ship and the price, and they then authorized me to buy them from Mr. Cleu at his price."

The defendants' counsel then asked the witness the following question:

"On what terms and conditions did the defendants authorize you to buy?"

The plaintiffs' counsel objected to the question, which objection was overruled by the Court, to which decision and ruling the plaintiffs' counsel duly excepted. The witness then, in answer to the question, further said: "Cleu & Co. told me to sell the nuts for good nuts, and McPherson told me if they were good nuts to buy them."

"I stated the price, terms, &c., to the defendants, and that the nuts were of a good quality, and they authorized me to buy them on those terms."

The direct examination being resumed, the witness further testified as follows:

• "The sale was made on the 7th of April, 1855; the sale note sent to the defendants' office, and was never returned to me. I sent one, also, to Mr. Cleu, and he did not return it."

"I have been a broker two years. There were, I think, 180 bags of walnuts on the two ships. I sold 80 of them."

It did not otherwise appear, than is shown by the evidence above quoted, what was the form of the sale note which the brokers sent to the plaintiffs.

Evidence was given in respect to the article known, in the trade, as French walnuts, as to the condition of the article as it usually is when it arrives at the port of New York, and as to the condition of the walnuts in question, on board of the Helen E. Miller, on her arrival.

The sale of the walnuts in question, at auction, after the defendants' refusal to accept and pay for them, and after due notice of such sale to the defendants, was proved, and also that they brought, as of May 2, 1855, the net sum of \$57 62, and

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that at the contract price they would amount to the sum of \$174 03.

After the testimony was closed, and the cause had been summed up to the jury, "the Court directed the jury to answer the following questions, to wit:

"1st. What were these walnuts worth per pound at the time they arrived and were tendered to the defendants?

"2d. What was the article known in the trade as French walnuts worth, per pound, at the same time, in the condition in which they generally arrive in this market?

"3d. Were these walnuts, when they arrived and were tendered, merchantable, as that word is understood by the trade with reference to such articles?

"4th. Were these walnuts, when they arrived and were tendered, in as good condition as the average of that article is, as they arrive in this market?

"The plaintiffs' counsel duly excepted to the said charge of the Court, directing the jury to answer the said questions, and to each and every of the questions respectively.

"The jury having deliberated thereon, rendered their verdict as follows:

"In answer to the first question they say, 'two and one-half cents per pound.'

"In answer to the second question they say, 'six and one-half cents per pound.'

"In answer to the third question they say, 'no.'

"In answer to the fourth question they say, 'no.'

"The Court thereupon ordered that the questions of law arising in the case be heard, in the first instance, before the Court at General Term, with leave to the Court at General Term to enter judgment in accordance with the facts, and the entry of judgment to be in the mean time suspended."

On the 20th of May, 1856, the plaintiffs moved the Court at General Term, for judgment on the facts conceded by the pleadings and admitted at the trial to have been established, and on the special verdict.

Gilbert Dean and James R. Vose, for the plaintiffs.

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A. R. Dyett, for the defendants.

BY THE COURT. HOFFMAN, J.—The first question is, whether the sale note, of itself, and without any extrinsic testimony, implies a representation and condition that the walnuts were and should be merchantable.

The next question relates to the admissibility of the evidence as to the terms of sale.

1. It is not to be denied that the rule of the common law, *caveat emptor*, is adopted in this State in its utmost strictness, as to all executed sales. The case of *Hart v. Wright* (17 Wendell, 267, and 18 Wendell, 449) has fully settled this point.

Yet this rule, as enforced in our tribunals, is not without exceptions. Thus if goods are ordered from a manufacturer to be made for a special purpose, there is an implied engagement that they shall answer such purpose. And so when provisions are purchased for consumption, and not for sale as merchandise, their proper quality is guaranteed.

2. But the contract in the present case was conditional and executory. It resembles in this particular, the case of *Shields v. Pettie* (2 Sand. 262; 4 Comstock, 122). There the article to be sold was "150 tons of Gartshemi pig iron, No. 1, at \$29 a ton, on board the Siddons." The vessel was then at sea. The iron turned out, on its arrival, not to be of the quality described. The Court below held that, the contract was to sell and deliver iron to arrive; that is, it was an agreement to deliver Gartshemi pig iron, No. 1, if any iron of that description arrived in the ship Siddons, on the voyage she was then making. It was settled that such a contract was conditional.

That proposition is substantially repeated in the opinion of HURLBUT, Justice, in the Court of Appeals.

In *Howard v. Hoey* (23 Wendell, 350), the contract was for ale, to be sent to the South, and to be good and merchantable, without any warranty against sourness. It was brewed after the contract, and sent South, where it proved ropy, sour, and wholly unfit for use.

The Court considered that had it been brewed, and specifically sold, an express warranty would have been necessary. (*Wright v. Hart*, 17 Wendell, 267; 18 Ibid. 449.) Justice COWEN then

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proceeded to state the rule: That where the contract is executory, or, in other words, to deliver an article not defined at the time, on a future day, whether the vendor has an article of the kind on hand, or it is afterwards to be procured, or manufactured, the promisee cannot be compelled to put up with an inferior article. The contract always carries an obligation that it shall be at least merchantable; at least of medium quality or goodness. The learned Judge proceeds with a critical examination of numerous authorities, and concludes: That as to executory contracts, it may be said, that the English law, and therefore our own, agrees with the Continental or Roman law, the rule of which, in regard to all sales, both executed and executory, is "*Caveat Venditor*," not "*Caveat Emptor*."

In *Hargous v. Stone* (1 Selden, 86), Justice PAIGE, in delivering the opinion of the Court, observed: "Executory contracts of sale do not depend upon the same principles as executed contracts of sale. The doctrine of implied warranty has properly no application to the former. Where a contract is executory, that is, to deliver an article not defined at the time, on a future day, whether the vendor has at the time an article of the kind on hand, or it is afterwards to be procured or manufactured, the contract carries with it an obligation that the article shall be merchantable, at least of medium quality or goodness." (Citing 23 Wendell, 351; 17 Wendell, 277; *Chanter v. Hopkins*, 4 Meeson & Welsby, Exch. 399.) "But, if the article is, at the time of the sale, in existence, and defined, and is specifically sold, and the title passes *in presenti* to the vendee, the transaction amounts to an executed sale; and, although there is no opportunity for inspection, there will be no implied warranty that the article is merchantable."

There are other authorities which may be usefully referred to.

In *Bridge v. Wain* (1 Starkie, 504), an order was given for a quantity of "scarlet cuttings," to be shipped on the purchaser's account, to China. An inferior article was sent on board which was unsaleable in China, and did not correspond with the article known in the trade as scarlet cuttings. The purchaser was held entitled to recover damages, on the ground of the implied warranty, which the acceptance of his order involved.

This case is, indeed, open to the observation that the trades-

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man, like a manufacturer, knew the nature of the article he sent, and that the purchaser trusted to him.

Gardiner v. Gray (4 Campbell, 144). A purchaser bought in London twelve bags of "waste silk," then on its way from the Continent, and directed it to be sent to Manchester. It was held that there was an implied undertaking to furnish an article fairly corresponding with the description; and an action was sustained for damages, by reason of the article being an inferior commodity, not saleable in the market, under the denomination of waste silk.

I cite this case as bearing upon the present question, notwithstanding the severe criticism of Mr. Justice COWEN upon it in *Hart v. Wright* (17 Wendell, 272). It has not been noticed that the article was, at the time of the sale, on the way from the Continent.

Laing v. Fidgeon (6 Taunton, 108), is fully approved in *Jones v. Bright* (2 Moore & Payne, 155). Saddles were ordered as "goods for North America, 8 dozen single flap saddles, 24s, to 26s, with cruppers, &c." It was proved that they were of very inferior quality, and unmerchandise. It was held, that though there was no express contract that the article should be merchandise, it resulted from the whole transaction that it was to be so.

In the case of *Hyatt v. Boyle* (5 Gill & Johnson, 110), treated by Justice COWEN as a well considered case (17 Wendell, 274), the Court say: "The exception to the rule of *caveat emptor*, arising from the want of opportunity to inspect, does not apply to cases like the present, but to those where the examination at the time of sale is, morally speaking, impracticable, as where goods are sold before their arrival on landing."

It is true, Justice COWEN doubts as to even this relaxation of the rule. But he is speaking of executed contracts of sale, for he himself laid down the law as to executory contracts, in *Howard v. Hoey*, 23 Wind. 350. Indeed he concludes his judgment in *Hart v. Wright* (*supra*) as follows:

"A contract to deliver goods generally of a certain description, is another matter. There the contract is executory, and the vendee may take his ground on a defective article being tendered. He has doubtless a right to insist that it shall be

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merchandise; and if it prove not to be so, after he shall have taken a reasonable time to inspect it, he may return it."

What is the meaning of the phrase used by both Justice COWEN and Justice PAIGE, "the article undefined," "not defined," or, "undetermined?"

The case of *Field v. Moore*, (Lailor's Supplement to Hill & Denio, p. 418) furnishes a satisfactory explanation. The sale was of 1000 flour barrels at 22 cents. The purchaser was shown barrels in the warehouse of the seller, of different kinds, and one pile of about 2000 barrels in a particular spot. It was signified that he would take the barrels out of this parcel. The question was whether the title to any one thousand barrels had passed.

BEARDSLEY, Justice, said, "Identity in the subject of a sale is indispensable. A sale is an executed contract by which the right of property is transferred from the seller to the buyer. The thing sold must, therefore, be specific, ascertained, and identified. Where the thing agreed to be sold is not thus ascertained, and identified, but is thereafter to be selected and delivered, there is not strictly speaking, a sale, but a special agreement to be executed in future. Such a contract conveys no present title or property to the one who agrees to purchase; his whole right is in action."

In the present case the complaint states that the plaintiffs, being in expectation of receiving a large quantity of French walnuts, by the ship Helen C. Miller, agreed to sell 25 bags of the walnuts so expected; and this part of the complaint may be treated as admitted. The witness Paddock states that he showed the defendant McPherson, the whole pile of nuts on the wharf, landed from the vessel; that there were one hundred bags of them, and told him he could have any he wished.

The case is then made out of a contract of sale purely conditional and executory; of the sale of an article then about being shipped at a foreign port, or then upon the seas; of a sale of a parcel or number out of an aggregate larger mass, not specifically defined and determined.

In such a case we are of opinion that there is an implied engagement in the contract itself, that the article shall be merchandise. It may be more appropriate to say that this is a condition of the agreement for a sale, than an implied warranty.

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It may also be, that the rule can be carried further, and applied to a case, where the article is specific and defined; but it is needless to go to this length for the decision of the present cause.

The great distinction between the civil and common law upon this subject, is referred to in the leading authorities, and the learning upon it need not be stated. The rule which we recognize and now apply, forms an important exception to the doctrine of the common law, and appears to have sprung from a consciousness of the superior morality of the principle of the civil law. The philosophical and able treatise of Mr. Verplanck has illustrated that principle with ample learning, and with that rare precision and felicity of diction which distinguish the productions of his mind. The reasoning which long was characterized as the speculation of a legal visionary, has become a guide to one great innovation upon the common law, and a marked advance in the foot-prints of the civil code.

The views thus stated are sufficient to decide the cause without adverting to the question of the admissibility of the evidence as to the verbal representations and statements of the parties.

The judgment must be for the defendants.

EDWARD COTTER v. JAMES E. BETTNER.

The defendant, owning a stone quarry, agreed, on the 9th of October, 1854, with one Edward Hollis, as follows: Hollis agreed with Bettner to blast stone in this quarry, and fit them for market, with men and materials to be furnished and paid for by himself. Bettner was to procure them to be drawn to his dock on the Hudson River, preparatory to selling them there, or forwarding them to New York to be sold. Hollis's men were to assist Bettner's teamster in loading the stone at the quarry, and in loading them on a boat if sent to New York for sale. Hollis was to pay half the expense of the powder, purchased necessarily for the business. Bettner was to retain possession of the stone and sell them. And it was further agreed that "the net proceeds shall be equally divided, share and share alike, one half to said Hollis, and the other to belong to said Bettner."

In November, 1854, while the business was prosecuted under this agreement, the plaintiff, while at work on adjoining premises, was injured by the careless and negligent manner in which stone were blasted out of this quarry, by men employed

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by Hollis, and under his exclusive direction and control, and sustained damage to the amount of \$1800.

Held, 1. That the defendant was liable for such injury.

2. That Bettner and Hollis were partners in quarrying the stone, and in the results of the business, in the sense and to the extent that the defendants in the case of *Bostwick v. Champion et al* (11 Wend. 571, and 18 id. 175) were partners.

3. One partner is liable to third persons for the negligent acts of his copartner in the prosecution of the partnership business. And each is liable, in *tort*, for the negligence of the servant employed and paid by one of them exclusively, by which a third person is injured, while such servant is engaged in the due course of his employment, in transacting the business of said partnership.

(Before BOSWORTH & WOODRUFF, J.J.)

Argued, June 17; decided, July 11, 1857.

THIS action comes before the Court, at General Term, upon a verdict for the plaintiff, subject to the opinion of the Court; the only questions arising at the trial, being questions of law, they were there ordered to be heard, in the first instance, at the General Term. The facts are as follows:

On the 14th of November, 1854, the plaintiff was injured by the careless and negligent manner, in which stone were blasted out of a quarry, near Yonkers, in Westchester county, N. Y., and sustained damages to the amount of \$1800.

The quarry was the property of the defendant, and at the time of the injury Edward Hollis was working it and blasting stone out of it, under, and pursuant to a written agreement between him and the plaintiff, which reads as follows, viz:

"Memorandum of agreement and lease, entered into this ninth day of October, 1854, between Edward Hollis and James E. Bettner—namely, said Hollis covenants and agrees with said Bettner to commence, prior to the first day of November next, to quarry out stone on the property and premises of said Bettner (lying and being in the town of Yonkers) for one equal share, namely, said Hollis is to do and furnish the labor and perform the part of procuring and working out said stone, for one equal half of the proceeds of the sale thereof, when realized by the said Bettner, who is to have the possession of the same, and to have them drawn to the dock on his premises, preparatory to the sale of the same on said dock, or otherwise forwarding them to New York for sale.

Said Hollis further covenants and agrees with said Bettner to work the quarry on the premises of said Bettner, known as the

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old quarry, in such manner and form as he has pointed out and described to said Bettner, viz., sloping down and grading the east side thereof in a suitable and satisfactory manner to said Bettner.

Said Hollis also agrees to bear one equal half of the expense which shall be incurred in the purchase of the powder necessary for the work above named; said Hollis also covenants and agrees with said Bettner to assist and aid the teamster who shall do the drawing of said stone from the quarry to the dock; in loading the truck, also in loading any boat which shall be engaged to take said stone on freight to New York, if required so to do by said Bettner; and that he shall and will put and keep the dock and the road between said quarry and the dock in good order and repair, during the term of this agreement, viz., two years, and said Bettner promises and agrees with said Hollis to have the stone which shall be quarried out by said Hollis, as aforesaid, drawn to the dock preparatory to their sale or shipment to New York for sale, and that when sold and the money realized therefor (by him, the said Bettner,) the net proceeds shall be equally divided, share and share alike, one half to said Hollis, and the other to belong to said Bettner; and said Bettner covenants with said Hollis, that he may continue to work said quarry or quarries in manner and form agreed upon for two years ensuing from the date hereof, provided he shall faithfully conform to and fulfil the covenants and agreements set forth in his part of this agreement, otherwise it shall be lawful for the said Bettner to annul and dissolve this agreement at his pleasure, on giving ten days' notice to said Hollis to that effect.

In witness of all which said Hollis and the said Bettner have hereto affixed their respective signatures."

Under that agreement, Edward Hollis employed three men to assist him in performing his part of the agreement. At the time of the casualty, they, and Edward Hollis, were employed in quarrying stone, and one of these men fired the fuse that communicated with the powder, by which the blast was made that did the injury.

The defendant had a team of his own, and a man hired by himself, employed in drawing to the dock, the stone which Hollis quarried; the dock being on the Hudson River, about 1800 feet

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from the place of the blast. By the blast, a large piece of rock was thrown a great distance, hit the plaintiff who was at work for a third person, on adjoining premises, fractured plaintiff's arm, in consequence of which he was confined in the hospital some months, and his arm permanently affected.

The action was tried before Mr JUSTICE SLOSSON and a jury, on the 14th of December, 1855. The judge submitted the questions of negligence and damage to the jury with proper instructions, who found a verdict for the plaintiff, with \$1300 damages, which verdict was rendered, and taken subject to the opinion of the Court, at General Term, upon the question of the defendant's liability under the aforesaid agreement, between him and Hollis, with liberty to the Court at General Term to dismiss the complaint, if of the opinion that the defendant is not liable, and judgment to be applied for at the General Term, in the first instance.

Jas. W. Gerard and Beck and McAdam, for plaintiff.

John M. Mason, for defendant.

BY THE COURT. BOSWORTH, J.—If Bettner & Hollis were partners in quarrying the stone and in the results of that business, in the sense that the defendants were, in the case of *Bostwick v. Champion and others*, it will be difficult to discriminate between that case and the present.—*Bostwick v. Champion et al.*, 11 Wend. 571, and 18 Wend. 175.

In the case cited the defendants, Champion, Bissell, Ewers, & Dodge, run a line of stage-coaches from Utica to Rochester. The route was divided into sections: the section from Utica to Vernon was occupied and run by Dodge; another section, extending west, by Ewers and others; and the remainder of the route by Champion & Bissell. The business was conducted as follows:

The occupants of each section provided their own carriages and horses, employed their own drivers, and paid the expenses of their separate section of the route, except the tolls at the turn-pike gates. The moneys received as the fare of passengers, after deducting such tolls, were divided among the occupants of the several sections, in proportion to the number of the miles of the route run by each.

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Bostwick's wife was injured while riding in a wagon, in consequence of a stage running against it, by the carelessness of the driver of the stage.

The injury happened on the section occupied by Dodge. The stage-coach which run against the wagon was owned by him, and the driver of it was employed and paid by him.

All the defendants were held to be partners, as to third persons, to such an extent as to be liable, as such, for such an injury to the party injured; although, as between themselves, the loss ought to be borne by Dodge alone.

By the agreement between Bettner & Hollis, the net proceeds of all the stone quarried under it, were to be equally divided between them. What other items of expense, if any, were to be deducted from the gross price for which the stone should be sold, to ascertain and determine the balance deemed to be net proceeds, may not be so clear as to be free from controversy.

While it is certain that no expenses of Hollis, for the wages of men he might hire to perform his part of the agreement, were to be deducted, nor any expenses on the part of Bettner, in drawing the stone from the quarry to the dock, it is quite clear that the cost of the powder used for blasting was to be deducted. By the terms of the contract each was to pay half of that expense, and, of course, its cost must be deducted to ascertain net proceeds.

If any part of the expense of transportation from the dock to New York, or of wharfage, slippage, or storage in that city, or of disposing of the stone in that market, were also to be deducted, then there would be some matters, other than the powder, as to which the expense was borne equally, as between themselves.

In *Bostwick v. Champion* there was but one item of expenditure to be deducted from the gross receipts for passengers' fares, viz., the tolls at the turnpike gates. The difference between the two amounts was to be divided in definite proportions.

In the case before us one item of expenditure (and perhaps others) was to be deducted from the aggregate of the gross receipts for the stone. In that respect, the two cases are alike.

The stages could not be run and fares earned without paying tolls at the turnpike gates.

The stone could not be blasted and produced from the quarry, so as to be the subjects of sale, according to the terms and

purposes of the agreement between Bettner & Hollis, without powder, and making the disbursements necessary to procure it.

In each case the expenditure which is made a charge upon the common fund, or which is to be deducted from it, before any division of profits can be made, is one which is necessary to enable the agreement between the contracting parties to be executed by either.

In each case it is made in order to earn profits by the prosecution of an enterprise or business, in which profits, as such, each is to participate, in stipulated proportions.

Of the agreement between Bettner & Hollis it may be said, that each contributed to the business of quarrying stone and vending them in the market as much as the other. The partners themselves, by their agreement, treat their contributions as equal. Bettner furnished the stone in his quarry, and men and teams, at his own expense, to draw the stone from the quarry to the dock.

Hollis contributed, at his own expense, the labor necessary to blast and quarry the stone, and to assist Bettner's teamster in loading the truck at the quarry which was to carry the stone to the dock, and also in loading any boat at the dock which should be engaged to take the stone on freight to New York.

Each was to pay half of the expense of the powder. They both treat what either agrees to do and furnish at his own expense, as equivalent to that to be done and furnished by the other at his expense.

One item of expense, it is expressly stipulated, shall be a common charge. It is unnecessary to determine whether it is not clearly contemplated that there may be other items of expense, which, if incurred, shall be deemed a common charge, and deducted from the gross receipts, in order to ascertain the sum to be equally divided between them.

Bettner & Hollis were, clearly, partners, in respect to the profits of the business.

In this case, as in *Bostwick v. Champion*, a third person sues to recover compensation for injuries, occasioned by the negligent manner in which the business was conducted.

In the latter case, all the defendants were charged as partners,

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although the injury was inflicted on a section of the route, occupied and run by only one of their number, under an agreement which required him to run it by conveyances, and drivers to be furnished by himself, and at his own expense; and although he was so occupying and running it at the time, and a driver hired, and paid by himself, was guilty of the negligence for which the action was brought.

If Bettner & Hollis had been united as defendants in this action, the analogy of the two cases would seem to be perfect throughout.

There is a marked distinction between the facts of this case, and of the cases of *Blake v. Ferris* (1 Seld. 48), and *Peck v. The Mayor of N. Y.* (4 Seld. 222), and the principles applicable to each.

In the present case, by reason of the partnership relation between Bettner & Hollis, the servants and laborers of either, while acting under and executing the agreement on the part of their immediate employers, are, as to third persons, the servants and laborers of the other, in so far, as the results of their negligence, while thus employed, may affect third persons.

Although hired and paid by one only, and acting at the time under his immediate direction, they are acting in a business which is that of both parties; in the results of which one is as much interested as the other, and in the fruits of which each has as much property and right of property as either.

In the other cases, there was no community of interest between the defendant and the particular contractor, by the negligence of whose employee, the injury was inflicted.

And the law is deemed to be well settled that one partner is liable, *in tort*, for the acts of his co-partner, in the prosecution of the co-partnership business, as well as upon contracts made by one for the benefit of the joint concern.

And each is liable, *in tort*, for the negligence of the servant employed, and paid by one of them exclusively, by which a third person is injured, while such servant is engaged in the business, from which both were to derive, as partners, a profit. (18 Wend. 185, 286).

The plaintiff is entitled to a judgment on the verdict. Judgment was entered accordingly.

CHARLES COOK v. GEORGE W. BEAL and SETH ADAMS.

When an agent has a general authority to sell goods, entrusted to him by the owner, or is held out to the world by his principal as possessing that authority, a sale made by him to an innocent purchaser, although in violation of his duty, and of his secret instructions, cannot be impeached. But the mere possession of goods, by a factor or commission merchant, is not evidence to the world that he has an unlimited authority to sell them, so as to preclude the owner from impeaching a sale made by him, by showing that the goods were entrusted to him for a wholly different purpose.

It is true, there are some dicta that support this proposition, and that have led to its adoption by some of the text writers; but there is no express adjudication, and the cases relied on as justifying it, when carefully examined, are found to lead to an opposite conclusion.

A sale made by a factor or agent not entrusted with the documentary evidence of title, or with the goods themselves for the purpose of sale, is not rendered valid by the provisions of the Factors' Act. On the contrary, the 6th section of the act, by a necessary implication, declares such a sale to be void.

(Before DUBB, SLOSSON & WOODRUFF, J.J.)

Heard, April 13; decided, July 11, 1857.

THIS action comes before the Court, at General Term, upon a case made by the plaintiff, upon exceptions taken on the trial, and there directed to be heard in the first instance at General Term.

This action was brought to obtain the delivery of a large quantity of wool, and was tried before Ch. Justice OAKLEY, and a jury, on the 22d December, 1856. He directed the complaint to be dismissed, on the ground that the action could not be sustained upon the facts proved.

The following are the material facts as established by the evidence on the trial,

The plaintiff, in 1855, possessed a large quantity of wool at his place of business in the county of Chemung, and made an arrangement with the firm of Davis and Peabody, for its storage in their warehouse in Duane street, New York, for the purpose of exhibiting it to the Northampton Manufacturing Company, who were large purchasers. The wool came to the

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warehouse about the first of May, 1855, and the Northampton Co. examined it but did not purchase it, and it remained in the warehouse. One Baker was the agent of the plaintiff in the purchase of the wool, and also for its sale subject to the approbation of the plaintiff, and while the plaintiff was absent at Charleston, S. C., he had power to fix the price for about a month. Davis & Peabody were provision merchants, selling provisions, beans, cheese, apples, &c., but not wool. Their agency was to communicate offers for the wool to Baker. They were not to sell, nor by any arrangement to have commissions. They were to be paid storage. They told the plaintiff Cook if he would store the wool in their vacant lofts, it might be sold, and he would not have to pay 5 or 10 per cent. commissions which wool dealers charged. Davis and Peabody failed before the sale, made by one Tuthill, who was a member of that firm when it failed, and succeeded them in December, 1855, and took the wool into his possession upon the same terms that it had been held by Davis & Peabody. He was a commission merchant, principally for the sale of provisions. Numerous offers for the purchase of the wool were made by various parties to Davis & Peabody, and they referred them to Baker. Tuthill also referred applicants to purchase, to Baker. Baker by direction submitted all offers to Cook, who declined them. Evidence was given tending to show that Tuthill had an express authority to sell, but it was deemed by the Court at General Term, wholly insufficient.

About the latter part of February, 1856, Cook directed his agent, Baker, to take the wool out of market. It was to be shipped to Boston.

On the 18th February, 1856, Tuthill rendered his bill for charges upon the wool to Cook, which had been requested a few days before, and which, after adjustment with Baker as the agent of Cook, was paid the next day by Raplie & Co., through Baker in full, and on the 15th day of February, Cook gave an order to Tuthill to deliver the wool to Raplie & Co., which was duly accepted, and Tuthill said it was all right, and it would be delivered. The arrangement with Tuthill about the room or loft, at the time of payment of the bill, was, that he was to store the wool until the first of March. The understanding was then had, that as on account of the condition of the streets, &c., the

wool could not yet be removed to Boston, he was to store it until the first of March.

Immediately after the acceptance of this order, and on the next day, 16th February, Tuthill wrote to Cook that he had sold the wool, which act Cook repudiated and disapproved, in his reply of the 18th, saying that Raplie & Co. were the only parties authorized to sell the wool. This was before it was taken out of market.

Between the 12th and 15th of March, the witness *Baker* discovered that the wool was being removed, and he asked Tuthill what he was doing with Cook's wool, and he said he had sold it to the defendants, and that he was authorized by Cook to sell. The witness replied that it could not be, and that Cook would not sanction anything of the kind, and forbade the delivery. Cook being advised by telegraph, came immediately to town, and called the next morning on the defendants, and notified them that it was his wool, and that Tuthill had no authority to sell it, and demanded the wool, about one half of which had then been received in their store; and Adams said the rest would be received that day, and that they had nothing to do with Cook, that they had bought it, and that he must go to Tuthill. The wool was 23,7551 pounds net. Wool rose after the 15th January, 1856. This wool was worth 48 cents in September, 1855; 53 cents in March, 1856, and 57½ cents at the time of trial.

The question arising upon these facts was, whether the defendants had acquired a valid title to the wool as *bonâ fide* purchasers.

When the plaintiff rested, the counsel for the defendants moved that the complaint be dismissed upon the grounds, that the wool was in Tuthill's possession, and that he had an express or implied authority to sell, and that at any rate the defendants were entitled to protection as *bonâ fide* purchasers.

The Chief Justice granted the motion, and the counsel for the plaintiff excepted.

A. Mann, Junr., for the plaintiff, moved for a new trial.

Jas. C. Carter, for defendants *contra*.

BY THE COURT. DUER, CH. J.—It was clearly proved upon

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the trial, and is not denied, that the plaintiff was the sole owner of the wool in controversy, when it was sold by Tuthill to the defendants, and consequently, unless the sale was made by his authority, he must be entitled to recover. The undoubted rule of the common law, that no person can give a better title to another than he himself possesses—*nemo plus juris in alium transferre potest quam ipse habet*—is applicable, with certain exceptions, to every sale of goods, whatever may be their character; and hence, unless it was established upon the trial that, by force of some known exception from the rule, the defendants are entitled to protection as *bond fide* purchasers, the complaint ought not to have been dismissed, and a new trial must be granted. As it is certain that Tuthill was not the owner of the wool, there must be a new trial, unless the evidence given was conclusive to show, either that he had an express authority to sell, or that the defendants were justified in believing that he possessed this authority, and that the plaintiff was estopped from denying it.

The whole argument for the defendants, therefore, rests upon the proposition, that we are bound to say, upon the evidence before us, that Tuthill possessed either an express or an implied authority to sell, and to give to the defendants a valid and unimpeachable title.

The allegation that he had an express authority, will not require many observations. So far from being sustained by the evidence, it is very clearly disproved, not only by the oral testimony of Baker, which is uncontradicted, but by the letters which the defendants themselves produced and read upon the trial. It was proved by Baker, that, as the agent of the plaintiff, he placed the wool in the possession of Davis & Peabody, as mere bailees for storage and safe keeping; that he gave to them no power whatever, of disposition, or to contract, but imposed on them the duty of communicating to him or the plaintiff all such offers of purchase as might be made to them, and if it be said that this conveyed to them an authority to receive such offers, it is not possible to contend that this was equivalent to an authority to sell. It was further proved, that the agreement and understanding with Tuthill, when he succeeded Davis & Peabody, was exactly the same; and if it may be inferred from the evidence

and correspondence that for a time he was entrusted with a power to sell, the proof is decisive that this authority was revoked several weeks before he made the sale to the defendants. It was effectually revoked when he accepted the order of the plaintiff, requiring him to deliver the wool to S. S. Raplie & Co., to whom, as the plaintiff informed him in his letter of the 18th February, the power of making a sale was from that time exclusively given. The sale fraudulently made by him to the defendants, contrary, as he well knew, to the wishes of the plaintiff, and in the exercise of a power that had been expressly denied to him, was on the 12th or 18th of March. Holding it, therefore, to be certain that Tuthill, in making the sale which is set up as a defence, acted without authority from the plaintiff, and in plain violation of his trust, the question that remains is, whether the trust has clothed him, by implication, with an authority to sell, which rendered the transaction valid and binding on the plaintiff. The contention on behalf of the defendants is, that where the owner of goods places them in the possession of a person whose known occupation is that of a commission merchant or factor, he by that act holds him out to the world as having a general and unlimited authority to sell, and consequently, when a sale is made to a purchaser in good faith, is not allowed to question its validity.

Now it is undoubtedly true, that when an agent has a general authority to sell, or is held out to the world by his principal as possessing that authority, a sale made by him to an innocent purchaser, although in violation of his duty and of his secret instructions, cannot be impeached; and we entirely agree with Mr. Justice STORY, that a contrary doctrine would lead to great abuses, and open a wide door to injustice and fraud, (Story on Agency, §§ 127-138,) but it by no means follows that the mere possession of merchantable goods by a factor is evidence to the world that he has an unlimited authority to sell them, and precludes the owner from showing that they were entrusted to him, not for sale, but for a wholly different purpose, such as transportation to another place, or temporary custody. It is not denied that there are many *dicta* to this effect, that have been adopted by text writers, but we fully believe that there has been no express adjudication. After a careful research, we were unable

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to discover any, and we were certainly not referred to any by the counsel for the defendants.

The only authorities to which we were referred by the learned counsel, are *Pickering v. Busk*, (15 East 38); *Whitehead v. Tuckett*, (id. 400), and the observations of Senator Verplanck, in *Saltus v. Everett*, (20 Wend. 281.)

Whitehead v. Tuckett, may be at once dismissed as irrelevant, for the general authority of the agent, in this case, was not implied, but distinctly proved—and the case is only one of a numerous class that have settled the doctrine, that the law will not permit the title of an innocent purchaser, to be defeated by his ignorance of the private instructions of an agent acting within the scope of his general authority.

Nor does *Pickering v. Busk*, as an actual decision, tend to establish the doctrine it was cited to prove. As a decision, it has no more relevancy to the question under consideration, than *Whitehead v. Tuckett*. The principal in this case had clothed the agent with a legal title to the property in dispute, and had thus enabled him as the apparent owner to sell it in his own name. We understand Mr. J. Story to admit that this was the true ground of the decision, (*Story on Agency*, § 164), and it was certainly upon these facts that Lord Ellenborough laid the stress of his opinion. That he who has the legal title may give a full title to a prior purchaser, has never been doubted; that there would be manifest injustice in permitting the owner to divest the title which he had thus enabled the faithless agent to convey, is confessed by all.

But although *Pickering v. Busk*, as an adjudication, is very far from sustaining the broad position upon which the defendant's counsel relied, that the mere possession of property by a factor is an implied authority to sell, it cannot be denied, that the position seems to be justified to some extent, by some of the observations that were made by Lord Ellenborough and his brethren, in the delivery of their opinions, but whether these extra-judicial *dicta*, for such they were, are a sufficient foundation for the doctrine, may deserve consideration. They form, apparently, a very slight basis of authority for the introduction of a new and wide exception from the sound rules of the common law, that possession is only presumptive existence of ownership or

authority, and that he who has in truth no right to sell, can give no title to another.

As to *Saltus v. Everett*, the judgment of the Court was in strict conformity to the rules of the common law, and the observations of Mr. Senator Verplanck, in his able opinion, were built entirely upon the *dicta* in *Pickering v. Busk*. They show his interpretation of those *dicta*, but make no addition to their authority.

For myself, I entertain very serious doubts whether the observations of the judges in *Pickering v. Busk*, detached from the context as they have been, have been rightly understood. I strongly incline to believe that a construction has been given to them that they were never designed to bear, and that such is the fact, in relation to those of one of the most eminent of these Judges, appears to be certain. The language of Mr. JUSTICE BAYLEY, the Judge to whom I refer, was—"If a man puts goods into another's custody, whose common business it is to sell, without any limitation of his authority, he confers an implied authority to sell." Mr. Senator Verplanck, in citing this passage, omits the qualifying and significant words, "without any limitation of his authority," and this omission led him to attribute a meaning to the learned Judge, widely different from that which the language of the Judge, when the omission is supplied, plainly conveys.

Mr. J. BAYLEY evidently meant, that an authority to sell will be implied only when a different object or purpose is not declared, but that when the exercise of the authority is limited, and *à fortiori* when the authority itself is expressly withheld, a sale made by the agent or bailee in violation of his duty, will no longer be binding on the owner. And such, I am persuaded, was not only his meaning, but that of the Court. A repeated perusal of all the opinions that were given, has convinced me that the ground of the decision was, that the facts of the case, in the absence of contrary proof, warranted the belief that the hemp—the subject in controversy—was, in reality, placed in the hands of the broker for the purpose of sale, and that we have, therefore, no right to say or suppose, that had it been proved, that such was not the purpose and intention of the plaintiff, it would not have been held that he was entitled to recover. It was held that he was bound by the sale, because the proof was deemed to be sufficient, that he intended a sale should be made. Hence, *Pickering*

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v. Busk, rightly interpreted, so far from being an authority for the defence now relied on, tends to prove its insufficiency. It was insisted by the counsel for the defendants, that the defence is fully sustained by the provision of the act "relative to principals, and factors or agents," (1 R. Stat. p. 774); but an attentive consideration of the statutory provisions has led us to an opposite conclusion. As we understand these provisions, so far from countenancing the defence, they prohibit and exclude it. They are directly inconsistent with the position that the possession of goods by a factor with the consent of the owner, is alone conclusive evidence of his authority to sell them, and precludes the owner from showing that they were put into his custody, not for the purpose of sale, but for storage only.

We do not doubt that the 8d section of this important statute was meant to be declaratory of the common law as it was understood by the framers of the act, and is now understood by ourselves. It accordingly renders valid every contract made by a factor or agent, for the sale or disposition of any merchandize in his possession, in two classes of cases: first, where the factor has the documentary evidence of title; and second, where he has been entrusted with the possession of the merchandize for the purpose of sale. It seems to us impossible to doubt that these last words, "for the purpose of sale," by their natural and just interpretation, confine the protection that in the second class of cases was meant to be given to purchasers, to the cases where the owner has entrusted the merchandize to the factor or agent, with the intention of enabling him to sell it, and with an authority to sell it; and, consequently, that the words are not applicable at all, when it is proved that no such intention existed, and that no such authority was meant to be given. If this construction be rejected, and that of the defendant's counsel be adopted, it will be found that the words, "for the purpose of sale," are superfluous or unmeaning. They are useless, if the factor may sell, no matter for what purpose the merchandize has been entrusted to him, and the possession is alone conclusive evidence of his right to sell. They are unmeaning, if they do not forbid him to sell when the merchandize has been entrusted to him for any other purpose than that of sale. There is a manifest solecism in saying that goods are entrusted to a factor for sale, which it is proved

that he received for storage only; and, if we adopt the defendant's construction, to get rid of the solecism, the words "for the purpose of sale" must be struck out from the law. This, assuredly, we have no right to do, but, on the contrary, are bound to give effect to those words, if a reasonable and consistent interpretation can be given to them. We are bound to say that their natural and obvious is their true meaning, unless it can be shown that it is irreconcilable with the other provisions of the statute. It is a sound and controlling rule of interpretation, that "*verba aliquid operari debent.*"

If we could admit that the third section of the statute is fairly susceptible of an interpretation different from that which has been stated, and consistent with the defence that is relied on, we must still hold that every reasonable doubt, as to our duty in the disposition of the case before us, is removed by the positive language of the 6th section of the statute, which is in the words following:

"§ 6. Nothing contained in this act shall authorize a common carrier, warehouse-keeper, or other person, to whom merchandise or other property may be committed for transportation or storage only, to sell or hypothecate the same." 1 R. S., p. 774.)

It cannot be said that there is any ambiguity here. The evident meaning of the Legislature is, that no sale made by a common carrier, warehouse-keeper, or other person, to whom property is committed for transportation or storage only, shall operate to divest the title of the true owners; in other words, that every such sale, as against the owner, shall be wholly void. We are unable to see that there are any grounds whatever for limiting the application of the words, "or other person," &c., to any particular class of persons; to those, for example, whose ordinary business is the transportation or storage of goods entrusted to their charge. Indeed, upon this construction, these added words were unnecessary; those that precede them were alone sufficient. It seems to us plain, that it is the special purpose for which merchandise or other property is committed, and not the special character or business of the person to whom it is committed, that takes from him the authority to sell that he might otherwise be held to possess. We are therefore convinced that no court of

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justice has the right to say that the words, "or other person," &c., are not just as applicable to commission merchants and factors, to whom goods are entrusted for transportation or storage only, as to any other class or description of persons whatever; and if this be so, there is an end of this controversy. The proof is conclusive that the plaintiff's wool was placed in the custody of Davis & Peabody, and was left in the custody of Tuthill "for storage only." Hence the sale made by Tuthill, as against the plaintiff, was wholly void. It was an unauthorized and fraudulent act, and however innocent the defendants may be, it passed no title which, as against the plaintiff, they can be permitted to allege. Such is the necessary effect of that which we deem to be the necessary construction of the statute.

It follows, that in our opinion, the plaintiff's complaint ought not to have been dismissed upon the trial, but that, upon the contrary, the Jury ought to have been instructed that upon the evidence before them, he was entitled to their verdict.

We must, therefore, order a new trial, with costs to abide the event.

There are a few words which, although not necessary to our decision, I deem it expedient to add.

If, notwithstanding the provisions of the Act "Relative to Principals, and Factors or Agents," which, from some unexplained cause, seem hitherto to have been passed over, the doctrine laid down by Senator Verplanck, in *Saltus v. Everett*, and to which both Chancellor Kent, in his Commentaries (2 Kent's Com., p. 621), and Mr. Justice STORY in his Treatise upon Agency (§§ 73, 94, 229), seem to have given their sanction, is to be followed as law, it may be seriously doubted, whether the doctrine as understood and explained by these eminent jurists, is applicable to the present case, so as to cover and warrant the defence that has been so confidently relied on. The doctrine thus explained, we understand to be this: That when the owner of goods puts them into the possession of a person whose ordinary and known business it is to sell goods, of the same description, he by this voluntary act holds out such person to the world as clothed with a general authority to sell, and, consequently, if a sale is made by him to an innocent purchaser, is concluded from denying its validity. If, under the doctrine applicable, therefore, it

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is evident that it must appear that the business of the agent was known to his principal, the owner of the goods, when he entrusted them to such agent's charge, and was known to him to embrace the sale of goods of the same description. Now, as I understand the evidence in the present case, the ordinary business of Davis & Peabody, when the plaintiff placed his wool in their custody, did not embrace the sale of wool. The testimony of Baker is express, that at that time they were sellers of provisions and other produce and not of wool, and if their business or that of their successor Tuthill was afterwards so enlarged as to embrace the sale of wool, there is no evidence that this change in the business was known to the plaintiff. There is no evidence, therefore, that by any voluntary act he held out Tuthill to the world as clothed with an authority to sell.

The plaintiff's counsel excepted upon the trial to the ruling of the Judge, in admitting evidence to show that Tuthill, previous to the sale to the defendants, had publicly become a dealer in wool, and if proof of this fact were alone sufficient to establish the defence, we think that the evidence given was properly admitted; but if we are right in the grounds upon which we now place our decision, this evidence upon a future trial will be immaterial and irrelevant, and ought, therefore, to be excluded. It will be irrelevant if the fact that the wool was left with Tuthill for storage only shall be conclusively proved.

Nonsuit set aside, and new trial granted; costs to abide event.

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COMPANY.

Under the conditions in a policy of insurance against fire, it is the duty of the assured to deliver to the Company, as a part of the preliminary proofs, a just and true account of his loss; and the delivery of this account is a condition precedent to his maintenance of an action for the recovery of the loss.

The assured is bound by the statement thus delivered, and cannot, upon the trial,

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impeach its truth, and recover upon testimony showing a different state of facts from that which it contains.

A witness, alleged to be a partner of the plaintiff, was examined on the trial to show the nature of the plaintiff's interest in the property insured, and it was insisted on the part of the defendants that his testimony was inconsistent with the statement delivered by the plaintiff to the Company, and, therefore, ought not to have been received.

But the Court held that there was a substantial agreement between the statements and the testimony, and that the latter was rather explanatory than contradictory, and that the necessary result of both was that, the plaintiff, if not the legal, was the equitable owner of all the property insured.

Held, therefore, that the property, on which the loss was claimed, and which was a stock of goods, in a certain store, was properly described in the policy as "his (i. e. the plaintiff's) stock," there being no other goods in the store to which the description could be applied.

Held, that it could not be doubted that the plaintiff meant to cover by an insurance, and the defendants meant to insure the very property destroyed, and this intention the Court was bound to carry into effect, if this could be done without violating the rules of law.

The general rule is that the assured is not bound to disclose the nature of his interest, whether legal or equitable, a several or an undivided share, unless the disclosure is material to the risk; and in the case before the Court, whether the property insured was "his" (the plaintiff's) at law or in equity, was plainly immaterial. The nature of his ownership could not possibly alter or affect the character of the risk.

Held, that this view of the plaintiff's rights was not forbidden or varied by a condition in the policy, that "if the interest in the property be a leasehold interest or other interest not absolute, it must be so represented to the Company, and expressed in the policy in writing, otherwise the insurance shall be void."

The plaintiff's interest in the property was not qualified or contingent, but in the fullest sense of the term was absolute. The property belonged to him in his own right, and not as a trustee for another; and if his interest was merely equitable, it was in its nature as absolute as a legal ownership, and hence the condition in the policy did not require it to be disclosed.

Held, that even if the interest of the plaintiff, in the property insured, was that of a partner, still his interest was properly described in the policy, and was insured to its actual extent.

That an insurance made by a partner on partnership property, although made in his own name, and expressed to be on his sole account, protects his undivided share, so as to entitle him in the event of a loss to recover to the extent of that interest, may be regarded as settled and undoubted law.

The conclusion, that the decisions fully justify, is that the plaintiff would be entitled to recover, to the extent of his own interest, even had it been proved that the witness Clark was interested as his partner in the stock of goods, which the policy describes as "his (the plaintiff's) stock," for although the description would be literally untrue, yet in order to carry into effect the certain intention of the parties it would be construed as applying not to the whole stock, but to the plaintiff's undivided share.

Lastly, in the opinion of the Court, the testimony tended to show that the co-

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partnership arrangement between the plaintiff & Clark, gave to the latter no interest in the capital stock as owner, but only secured to him a share of the net profits when realized.

If such was the arrangement Clark could assert no title in the property insured, and, consequently, the property was rightly described by the plaintiff in the policy as "his stock." Hence in every possible aspect of the case the plaintiff was entitled to judgment.

Verdict sustained, and reference ordered to ascertain the amount of the loss.

(Before BOSWORTH & WOODRUFF, J.J.)

Heard, June 19; decided, July 11, 1857.

THE questions, discussed and decided in this action, arise on a verdict taken, subject to the opinion of the Court at General Term.

The action was brought to recover a loss under a policy of insurance against fire, and the following are the material facts, as proved upon the trial, before OAKLEY, Ch. Justice, and a jury, in March, 1857.

The defendants by their policy dated September 5th, 1855, insured "Charles Irving, (the plaintiff) against loss or damage by fire to the amount of \$1,750 on his stock as a cabinet manufacturer, finished and unfinished, and materials for making the same contained in the five-story brick building, with metal roof, situated in the rear of Nos. 110, 112 and 114, East 27th street, in the city of New York."

Among the conditions of the insurance annexed to the policy and by express reference incorporated in it, was the following: "If the interest in property to be insured be a leasehold interest or other interest not absolute, it must be so represented to the Company and expressed in the policy, in writing, otherwise the insurance shall be void."

Another condition required the assured in case of loss to deliver to the Company, as soon as possible, as particular an account of his loss and damage as the nature of the case will admit, which account must be sworn to be true and just.

On the 19th of December, 1855, a fire occurred, which partially destroyed the three buildings, and the stock of cabinet furniture, and materials contained therein, and it is averred that the loss and damage sustained by the plaintiff, by the injury to such stock and materials, amounted to the sum of \$8,500.

There were other insurances to the amount of \$6,750, making

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the whole amount of insurance \$8,500, whereupon the plaintiff claims for a total loss, the amount insured \$1,750.

By the plaintiff's statement of loss, sworn to by him, submitted to the defendants, and read as evidence in chief on the trial, it is stated that the stock contained in the buildings at the time of the fire, "belonged to him, as herein-after stated." That is to say, "his ownership of the said property was as follows: He was then, and is now, the principal member of the firm of Irving and Clark, by which firm the said property was manufactured and possessed; that he furnished all the capital of the said firm, and was then, and is now almost its sole creditor, and his interest therein covers and would absorb as he believes not only all the said property, but all the assets of the said firm."

The defence interposed by the Company rests upon the ground that the subject of the insurance is described as the plaintiff's sole property, and that property held under such ownership as is above described in the plaintiff's statement of loss is not covered by the policy, and therefore the plaintiff has sustained no loss or damage by fire "on the subject insured by said policy."

On the trial, *Clark*, the person whose name is used in the firm name of "Irving & Clark," gave testimony tending to show that in December, 1854, he entered into a negotiation with the plaintiff in respect to forming a partnership. That he went with him upon the understanding that they were to become partners, and were to share equally in the profits—that he continued with the plaintiff upon that understanding until six weeks before he (*Clark*) left for California, which was November 20th, 1855, i. e. until early in October, 1855, when he says, that understanding was abandoned, and the plaintiff was to give him a proper remuneration for his services. As the witness expresses it, "Our co-partnership here was not consummated, and in September or October, 1855, we agreed to abandon all thoughts of it, and plaintiff agreed to pay me for my services." The witness further says, "the capital in the business here all belonged to the plaintiff—the property was all his, and the profits all his." "I suppose that he and I, are to the world, partners, but between ourselves, we are not, and have never been so." And again—

"At the time of the insurance, and at the time of the fire, there was no partnership existing between the plaintiff and

myself. There was no sign up—There were bills headed 'Irving and Clark,' they were so from the beginning, and have continued up to the present time, and the business was, and is done in our names. I am now there in the same way; when I returned, he continued in the same manner; we are not co-partners now. I don't participate at all in the profits. I had no interest in the property destroyed—nor have I any interest in the property now on the premises; all the property burned belonged to the plaintiff alone.

"I have no fixed compensation. I take so much money a week as I need to support myself with, at no given rate."

To the evidence of this witness, the defendants objected, but it was received and the defendants excepted. The ground of objection does not appear in the case—but on the argument it was insisted that the plaintiff was not at liberty to contradict his sworn statement contained in his proof of loss, and that this testimony of Clark was such contradiction.

By consent, a verdict was entered for the nominal sum of \$2,000, "subject to the opinion of the Court at General Term, on a case to be made, and subject to a reference to determine the amount of the loss, with liberty to reduce the amount or turn the same into a dismissal of the complaint."

D. D. Field, for the plaintiff, insisted that the property insured belonged to the plaintiff at the time of the insurance and of the loss. The arrangement between him and Clark, and their subsequent conduct, may have made them liable to third persons as partners, but they were never partners as between themselves, and Clark had never any interest in the property. The question, therefore, does not arise how far a person who insures in his own name can recover for his interest as a partner.

If, however, the question had arisen, it would have presented no difficulty. A partner may insure the partnership property in his own name, and recover his entire interest, whatever it may be. Each partner is vested with the whole property. It is not a misdescription to describe the property as his. (3 Kent's Com. 258; 2 Duer's Ins. 19-20; *Turner v. Burrows*, 5 Wend. 541; *Ib.*, 8 Wend. 144; *Burgher v. The Columbian Ins. Co.*, 17 Barb. 274.)

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J. M. Van Cott, for the defendants, argued as follows: We contend that the defendants' liability is limited by the contract. By the terms of the policy, the plaintiff is insured "on his stock" against such loss "as shall happen by fire to the property above specified." These words describe and limit the subject of the insurance, and the policy covers no property of which the plaintiff was not the "absolute" and exclusive owner.

The risk is estimated upon the knowledge of the person assured, in whose integrity, care and interest to preserve the property, a confidence is reposed; and it is varied by a variance of the interest, and by a participation in interest and custody by persons who may be less careful and honest. A company may be willing to insure A, but not to insure B, or A and B. (2 Peters, 47, *Columbia Ins. Co. v. Lawrence*.)

The policy industriously excludes every risk, except for property owned by the plaintiff, reposing confidence only in him, and obtaining guarantees only against his acts and omissions.

By the third condition, all interests not "absolute," are excluded, unless expressed in the policy.

By the fourth condition, a change of interest, by assignment, avoids the policy, unless the Company consents by endorsement to continue the risk as altered.

By the fifth condition, prior or subsequent insurance, not communicated or endorsed, avoids the policy. If parties having a joint interest, can each obtain a separate insurance, and in the policy describe the property as "his," this condition is no shield against fraud.

By the sixth condition, the assured is required to use his best endeavors to save the property. The criminal neglect of a partner (the insurance being single) could not be availed of by the insurer.

By the ninth condition, fraud and false swearing work a forfeiture of the policy; but if the assured have not the knowledge, that is an element of the fraud and perjury, the policy is not forfeited by the knowledge of the party in joint interest, who is not named in the policy.

These cautiously stipulated conditions are decisive of the construction of the policy, and defeat this action.

Fire and marine policies vary materially in their terms,

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In a marine policy, the thing insured is determinate—as a ship named and registered—and the insurance is upon that subject, for account of the owners, or of whom it may concern, or, in terms, of the undefined and changing interest of part owner, mortgagee, or other party.

The plaintiff is estopped by his sworn proof of loss to allege that Clark was not a partner and jointly interested in the property. If he meant to, and could, revoke that statement, he was bound to do it explicitly, and to deliver a new proof of loss.

The variance is material. The right changes with the fact. A loss as sole owner, and a loss as joint owner with Clark, are fundamentally different things, involving substantially variant rights and liabilities; and the plaintiff was not at liberty to play fast and loose, and go upon one or the other ground, as opinions and circumstances might change.

But the evidence makes Clark a partner. The business was done, and is now done, in the firm name. Clark draws for his expenses like a partner, and plaintiff swears to the partnership. These decisive circumstances cannot be moulded to suit the legal opinion of Clark, or the legal necessities of the plaintiff.

By the ninth condition of the policy, the assured is required promptly to deliver to the Company, under oath, “a particular account of his loss,” and also to show “how the building was occupied at the time of the loss.” The policy is forfeited by non-compliance with this condition; and the loss is in no case payable until sixty days after such proof of loss.

If Clark is not a partner and jointly interested in the property, or if the building was not occupied by Irving & Clark at the time of the fire, the proof of loss was both false and defective, and the action was at least prematurely brought.

If the plaintiff can recover at all in this action, it can be only his undivided interest in the property of Irving & Clark. He cannot recover in the character of a creditor of the firm, with an equitable lien upon the partnership assets.

The defendants are therefore entitled to judgment.

BY THE COURT. WOODRUFF, J.—It was the duty of the plaintiff to deliver to the Company a just and true account of his loss, which should be as particular as the nature of the case would

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admit, and should be verified by his oath. This he attempted to do. This was a part of his preliminary proofs. Such delivery was a condition precedent to his right to recover. By express condition, the amount of loss is not payable until sixty days after such account (with other proofs) is delivered. The defendants made no objection to the sufficiency of the account furnished, and by their answer have acquiesced in its truth. They rested upon the claim that if the facts so stated and sworn to are true, they are not liable. The plaintiff could not therefore, on the trial, change his ground, by impeaching the truth of his own statement. The defendants had a right to take the facts as he stated them. They have been furnished with no other. Had any other been delivered, they would have been entitled to sixty days for examination, and then might, in their defence, have relied upon showing that the plaintiff's loss was not truly stated. We are therefore of opinion that in regard to the material facts stated by the plaintiff in his affidavit of loss, &c., he is, certainly for the purposes of the trial of this action and its decision, concluded by that affidavit.

Under that view of the plaintiff's position before the Court, the testimony of the witness, Clark, is to be rejected unless it harmonizes with the plaintiff's statement; but so far as such harmony exists it may properly be taken into view; and to that extent, at least, it was properly received in evidence. It is no valid objection to his testimony, that it more fully explains the relations existing between himself and the plaintiff, in that firm of "Irving & Clark," who are stated, by the plaintiff, to be the firm by which the property was manufactured and possessed, or that it tends to show in what sense the property insured by the plaintiff was his property, although manufactured and possessed by Irving & Clark.

Read together, the affidavit of the plaintiff and the testimony of Clark show that Irving, having capital and stock in trade, as a cabinet manufacturer, received Clark into connection with him, upon an understanding that he should have one half the profits, the whole capital being furnished by the plaintiff, and the whole property belonging to him, subject only to Clark's claim to such half of the profits of the business; and under this arrangement, the business was done in their joint names as "Irving & Clark."

Such were their relations when the insurance now in question was effected. They were ostensibly partners. The property had been manufactured under their firm name of Irving & Clark, and was in their joint possession. But the plaintiff owned the whole capital, and on a settlement with him for such capital and advances, the whole property and assets of the firm must necessarily be applied to his benefit, so that in a practical sense Clark had no interest in the property itself, though he might be entitled to share the profits of its employment, and his testimony shows that he so understood it. His testimony, therefore, confirms the affidavit of the plaintiff. The only difference between the testimony of the witness, Clark, and the affidavit of the plaintiff, seems to be that, according to Clark's understanding of the subject, although they entered into a verbal agreement to form a partnership, and actually carried on business under the name of Irving & Clark, and so became, as "to the world," co-partners, yet that in truth such agreement was never consummated by the actual formation of a copartnership, but "all thoughts of it were abandoned before the witness went to California;" and therefore, inasmuch as the property was all put into the business by the plaintiff, and was due to him in reimbursement, the witness had no interest in it.—While the plaintiff, in his affidavit, regards the firm as an actually subsisting firm, the property of which was all due to him for his advances or contributions thereto, without, on his part, attempting to define the terms of his agreement with Clark, so as to say whether Clark was interested in the property, or in the profits only. If they differ, it is rather in their views of the legal effect of their arrangement, than in the facts themselves.

The plaintiff was then in fact the substantial owner of the property insured. He was in possession and had a legal title, and his equitable interest covered the whole property. This seems to us sufficient to answer the description, "his stock," &c., in the policy.

There was no other property on the premises; there was, therefore, nothing else which could be described by the terms, "his stock." It was not denied on the argument, that had the language of the policy been "the stock, &c.," the plaintiff's interest in the stock would have been protected by the policy. We

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think it would be too rigid a construction to say, when there is no other stock to which the policy can apply, that "his stock" may not mean the stock in which he is interested to the whole amount and value thereof, because another may be or is entitled to see that it is rightly appropriated to satisfy the plaintiff's interest.

The stock lost was the stock of goods in the store, or ware-room, described in the policy. It is to be assumed that the Company knew what goods they were insuring. There can be no possible doubt that the plaintiff intended to effect insurance, and the defendants intended to insure the very property which was destroyed. We deem it most conducive to justice to give effect to that intention, if we can do so without violating the rules of law.

If there was no misrepresentation and no concealment which should vitiate the policy, no rule of law forbids our construing the words, "his stock," according to the substantial interest of the plaintiff in the property.

The general rule on this subject is, that the assured is not bound to disclose the nature of his interest—whether legal or equitable, whether a distinct or an undivided share—unless such disclosure is material to the risk.—2 Duer on Ins., p. 448; L. 13, § 44; *Lawrence v. Van Horn*, 1 Caines, 284. Now, whether the property was "his," (the plaintiff's) at law, or in equity, was quite immaterial. The plaintiff had the same motive to its preservation. No effectual double, or over-insurance could be had to their prejudice.

This subject is discussed in *Niblo v. The North Am. Fire Ins. Co.*, 1 Sandford S. C. Rep. 551, and it is there held, that a tenant who insures "his buildings," may recover to the extent of his interest therein, though he have but a term for one year, subject to the payment of rent—that the description in the policy "his buildings," is not equivalent to a warranty on the part of the assured that he is the owner, nor does it constitute a material misrepresentation—that where no inquiry is made, he will in such case recover according to his real interest, whether it is absolute or qualified.

That case and others cited in the opinion have a very important if not conclusive bearing upon the case before us; they show

that the word "his," is not necessarily to be construed as importing absolute legal title, and may not be satisfied in any other manner.

It must, we think, be conceded that when there is an insurance of a person upon "his stock of goods," in a specified store, and it appears not only that he is carrying on business there as a sole trader, but that other business is carried on in the same store by himself, and another as co-partners, the insurance must be confined to the goods pertaining to his sole and separate business; but that concession, we think, does not conflict with the conclusion, that where the only property answering the description in the policy, i. e. the only goods upon the premises, are his in the sense disclosed by the proof in this cause, the policy shall be held to relate to them. The Court should give effect to the contract, rather than that it should fail. The Court can do this, as we think, and effectuate the actual design of the parties without contradicting the terms of the policy, or doing violence to its language.

It was suggested that this view of the plaintiff's right is forbidden by the condition in the policy, that "if the interest in the property be a leasehold interest, or other interest, not absolute, it must be so represented to the Company, and expressed in the policy in writing, or otherwise the insurance shall be void." We think not. The plaintiff's interest, whether legal or equitable, is an absolute interest; it is not contingent. He had a clear right to have the whole property, applied to his use at the time the insurance was effected. It was his, in his own right—not in trust for any other. The condition is not, that if his interest is equitable, it must be disclosed; an equitable interest may be in its nature as absolute as a legal title.

Upon this view of the construction of the policy, and the rights of the plaintiff under the facts proved, we think the plaintiff's interest was protected by the policy, and that he should have a reference to determine the amount of loss pursuant to the stipulation at the trial.

In what has been said, we are not to be understood as deciding that even if the property destroyed belonged in a more enlarged sense to the firm of "Irving & Clark," and the interest of the plaintiff therein was not explained any further than is stated in

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the plaintiff's affidavit, he could not recover to the extent of his interest.

That one of two parties may insure his interest in the joint stock was not, and cannot be denied. And if one partner insures in his own name only, it will protect his undivided interest in the partnership, and that only. (*Graves v. Bost. Mu. In. Co.*, 2 Cranch, 419; *Dumas v. Jones*, 4 Mass. 647.) Where there are general words which will admit of application to an alleged intent to insure the joint interest, though the policy be in the name of one only, extrinsic proof may be given to show whether the insurance was intended by the assured party to cover his interest solely, or that of his partners also. (*Lawrence and Whitney v. Van Horne et al.*, 1 Caines, 284; *Lawrence v. Sebor*, 2 Caines, 208.)

The case of *The Pacific Ins. Co. v. Catlett*, 4 Wend. 75, (S. C. 1 Wend. 561,) appears to us to apply with great significance to this case. There was an insurance in terms "on account of the owners" on vessel and on cargo; and the plaintiffs were held entitled to recover the full sum insured, although it appeared that the plaintiffs (by whose orders the insurance was effected) owned only five-sixths, (see S. C., 1 Paine, U. S. Dist. Ct. R.)

The subject is elaborately discussed in 2 Duer on Ins. p. 24, &c., Lec. 9, § 20, § 31, and notes III. and IV., p. 74 and 83, and cases reviewed. It is shown that it is not necessary that the nature of the interest of the assured be set forth in the policy, and that an undivided interest in joint property, may be insured without a specific description of it in the policy as joint or undivided. To the latter effect, is the case cited from 1st and 4th Wendell *supra*.

Chancellor Kent refers to Valin and Boulay Paty as authority on the Continent of Europe, that where a partner insures partnership property as his goods, the insurance covers the whole interest of the firm, while in this country it is deemed that where the insurance is expressed to be on his sole account, it protects his individual share only. (See 3 Kent, 258, 2 Duer on Ins. 22-4, § 19, &c.) and see *Turner v. Burrows*, 5 Wend. 541, 8 *id.* 144; *Burgher et al. v. The Columbian Ins. Co.*, 17 Barb. 274.) The case last cited, was considered in the Court of Appeals, and the views expressed in the Supreme Court, so far as they bear on the pre-

sent case, are reiterated in the opinion pronounced in that Court. So far as applicable they tend to sustain the right of the plaintiff herein to recover upon the policy as a protection to his interest in the subject insured. (See opinion of Mr. JUSTICE HAND, MSS.)

The principles thus stated, and especially the cases of *Niblo v. The North Am. Ins. Co.* and *Pacific Ins. Co. v. Catlett*, we think, warrant the conclusion, that where the insurance is effected in good faith, without fraud or misrepresentation, with intent to protect the assured, upon goods described as his goods in a particular store, there being no other goods on the premises, the interest of the assured will be protected thereby, notwithstanding another person has also an interest in the same goods as co-partner. And this view ought more clearly to prevail, when, as in the present case, the interest of such co-partner is only nominal, the assured being in truth, the substantial and beneficial owner.

We add, in conclusion, that there is one other aspect of the interest of Clark in the business of the firm of Irving & Clark, which relieves the plaintiff's title from embarrassment or doubt. His testimony tends in some degree to the conclusion, that the terms of the co-partnership arrangement did not contemplate the acquisition by him of any interest in the capital stock as owner, but only secured to him a share of the net profits when realized. Such an arrangement is not inconsistent with the affidavit of the plaintiff. Although such an arrangement would entitle Clark to require the appropriation of the property to the joint use, so far as to realize the profits he was to share, still, we think, that under such an arrangement, Clark could not assert title in the property itself, and if not, then of course, the property was rightly described by the plaintiff in the policy as "his stock."

The verdict must be sustained, and a reference must be ordered to determine the amount of the loss in accordance with the consent given at the trial.

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The insurance, in this case, by a policy against fire, was upon "the printing, and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam-engine, and machinery, contained in the buildings, described in the policy, and privileged for a printing office, bindery, and book store, and steam boiler in the yard." The Jury found that when the policy was effected, the use of camphene for fine work in the printing of books, was a general and established usage among printers, and that its use for this purpose was not only more advantageous than that of any other article, but was necessary. The 8th condition, annexed to the policy, provided among other things, that the Company should not be liable for a loss by fire, "occasioned by camphene or other inflammable liquid." The loss claimed, in the opinion of the Court, was not "occasioned by camphene," in the true meaning of the exception.

Held, that under the finding of the Jury, the defendants, when the policy was effected, were chargeable with a knowledge of the fact, that camphene was one of the materials used by the plaintiffs in the printing of books, and, consequently, that its use for this purpose was as effectually protected, by the general words of the policy, as if it had been authorized in terms.

Held, that evidence of the general and established usage of printers was properly admitted.

Held, that as camphene was an article covered by the policy, the defendants took upon themselves the risk of any and every loss incident to, or resulting from its use.

Held, that by this construction, the exception in the 8th condition of the policy was not wholly superseded, since it might still operate to exempt the defendants from a loss occasioned by the use of camphene for any other purpose than as a material for the printing of books.

Judgment for plaintiffs upon the verdict, with costs.

(Before DUER, SLOSSON & WOODRUFF, J.J.)

Heard, April 17; decided, July 11, 1857.

THE questions, decided in this action, arise on a verdict for the plaintiff, taken, subject to the opinion of the Court at General Term, on the exceptions taken on the trial.

The action was brought to recover a total loss, under a policy of insurance against fire issued by the defendants, and dated the 8d of March, 1853. By the terms of the policy, the defendants insured the plaintiffs against loss or damage by fire, to the amount of \$10,000, on their printing, and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam.

engine, contained in certain brick buildings, particularly described in the policy, with the privilege "for a printing office, bindery, book store, and steam boiler in the yard."

The defence was, that the fire was occasioned by camphene, in violation of the conditions of the policy, and of the rights of the defendants. The 8th condition of the policy, to which the defence refers, declares among other things, that the Company shall not be liable for loss or damage by fire "occasioned by camphene or other inflammable liquid."

The cause was tried before Mr. JUSTICE DUER, and a Jury, in January, 1855. The defendants' counsel admitted the execution and delivery of the policy, and of the preliminary proofs, the fire, the plaintiffs' ownership of the goods insured, their destruction by the fire, and that the loss exceeded the amount insured.

It was proved that the fire was caused by the accidental ignition of a quantity of camphene, kept in the plaintiffs' printing office, in a large and open sheet iron pan, in which the rollers, used for fine printing, were cleaned.

A number of witnesses were examined, on the part of the plaintiffs, to prove that this use, of camphene, was general, among printers, and was not merely advantageous, but, for fine work, absolutely necessary.

When the plaintiffs rested, the defendants' counsel moved for a nonsuit, substantially on the grounds, stated in his points on the argument, at General Term. The motion was denied, and the counsel excepted.

Several witnesses were examined for the defendants, to repel the testimony on the part of the plaintiffs.

When the testimony was closed, and the counsel had summed up, the Judge submitted to the Jury the following questions:

1st. Was there a general and established usage among printers in the use of camphene for fine work in the printing of books, at the time this policy was effected?

2d. Was the use of camphene necessary for fine work in the printing of books?

3d. If not necessary, was its use more advantageous than that of any other article for the purposes for which it is proved to have been used?

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And he then charged the Jury, that if they answered either of the questions in the affirmative, they should find a verdict for the plaintiffs for the amount of the policy.

The counsel for the defendants excepted to the charge.

The Jury answered all the above questions in the affirmative, and rendered a verdict for plaintiffs for \$11,278 76.

Wm. M. Evarts, in moving for judgment for the plaintiffs upon the verdict, made and argued the following points:

I. Under the finding of the jury as to the necessary use of camphene in the printing of books, and the general established usage of the trade so to employ that article, it is impossible to contend that its use by the plaintiffs, as proved, was not within the special description of the subject insured, and the special privilege accorded by the policy.

II. It is equally clear that the disclosure of the subject and object of the insurance as recited in the policy, repels any suggestion of concealment of the element of risk supposed to arise from this use of camphene in printing.

This notice of the subject of insurance, and of the purposes for which the premises in which it was situated were privileged, either gave the company actual information of all the elements of risk involved, or put them upon inquiry.

III. If then the general conditions of the policy be construed as a warranty by the assured against the use of camphene, the particular use within the description and the privilege of the subject insured, is allowed by the special terms of the contract. (*Wall v. Howard Ins. Co.*, 14 Barb. 383; *Bryant v. Poughkeepsie Ins. Co.*, 21; *Id.* 154; *Harper v. the same*, G.T. S. C. Nov. 1856.)

IV. The only remaining question is, whether, though the use of camphene in printing be allowed by the policy, the manner of the loss exempts the defendants from liability, as not being a risk insured against.

V. The property insured was destroyed by fire; fire was the proximate cause and the exclusive agent of its destruction; destruction by fire was the risk insured against.

VI. The originating and responsible cause to which the destruction by fire is traceable, is the careless yet purely casual communication of an ignited material to camphene, as in use

within the privilege of the policy, such camphene being a part of the subject insured against fire.

The ignition was independent of the camphene in its origin; that its spread on the subjects insured was through the inflammability of camphene, which formed an incorporate part of the subjects insured, does not make the camphene the occasion of the loss.

Camphene can, within the meaning of the policy, be regarded as occasioning a loss by fire, only when it occasions the original ignition by its inflammable nature, or, at the furthest, when its use becomes the means whereby the proper and ordinary use of light or fire in the premises is inflamed into a destructive combustion, occasioning the loss.

Camphene cannot be regarded as occasioning a loss by fire, merely because the ignition reaching it becomes less controllable than before; this would be equivalent to a repudiation of loss where camphene was used, although its use was licensed and it was itself insured.

VII. The true construction of the clause, in regard to loss occasioned by camphene, in connection with the special subject insured, which includes camphene, and the special privilege accorded, which involves the use of camphene, is, that a loss occasioned by camphene in a relation or use outside of the description and privilege, is excluded from the risks assumed.

A. K. Hadley, for the defendants, made and argued the following points:

I. The fire and consequent loss were occasioned by camphene, and therefore within the express exception contained in the 8th condition annexed to and forming part of the policy. (12 Wendell, 456; 2 Denio, 78; 2 Comstock, 220; 5 Hill, 18.)

It is lawful and proper in itself, and binding and conclusive upon the plaintiffs; and this notwithstanding the defendants may have known and assented to the use of camphene. (*St. John v. The American Mutual Fire and Marine Ins. Co.*, 1 Duer, 871; 1 Kernan, 516.)

It was clearly competent for the defendants to authorize the use of camphene, and yet screen themselves from any liability on account of loss occasioned by it.

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They also expressly authorized the use of a "steam boiler in the yard," and yet provided that "this company will not be liable for any loss, either by fire or otherwise, occasioned by the explosion of a steam boiler;" and this last condition the Court of Appeals, as well as this Court, has already held to be valid and conclusive upon the plaintiffs, in the case of *St. John and others* against *The American Mutual Fire and Marine Insurance Co.*, above cited.

II. All testimony tending to show the usage of printers, and the necessity or utility of camphene, was incompetent, and improperly received.

1st. The contract being free from ambiguity, no such usage, necessity, or utility could have any effect to change its purport or effect. (Cowen & Hill's *Notes*, 1396-7, 1416, 1463; 16 Wend. 285.)

2d. The usage of the trade in this particular was not brought home to the knowledge of the defendants; neither was it so general, so well settled, so uniformly acted on, or of so long continuance, as to raise any presumption of such knowledge, or that the contract was made with reference to it. (Cowen & Hill, 1412, 1417.)

BY THE COURT. SLOSSON, J.—It is difficult to distinguish this case from that of *St. John v. The American Mutual Fire Insurance Company*, (1 Duer Rep. 371, affirmed 1 Kernan Rep. 516,) and unless the privilege contained in the policy, taken in connection with the general nature of the subject insured, to wit, a printing and book establishment, creates a distinction between the two, that case must be decisive of this.

The defence mainly relied upon is, that the fire was "occasioned by camphene," a risk from which, by the eighth printed condition of the policy, the Company is expressly exempted.

The conditions of the policy are, by express reference to them in the body of the instrument, made part of the contract, and it is provided in terms, that they "are to be used and resorted to, in order to explain the rights and obligations of the parties thereto in all cases not therein otherwise 'specially provided for.'"

The camphene was kept in open sheet-iron jars or pans, in two rooms, one on the second, and one on the third floors, expressly fitted up and arranged, and supposed to be sufficiently so, to prevent any dangerous communication between them and other parts of the building in case of accident in the use of the article.

These jars or pans were stationary. They were nearly four feet long, and the fluid was put into them to the depth of from two to two and a half feet; they were used for dipping the rollers, used in printing, for the purpose of cleaning them.

The fire was communicated to the camphene by one of the workmen, accidentally or carelessly, dropping or throwing a lighted paper or match into one of the open jars.

The fire spread with immediate and fatal rapidity, and the whole building, with almost its entire contents, was destroyed, producing an immense loss.

The insurance was for \$10,000, on the plaintiffs' "printing and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam engine, and machinery, contained in [the premises in Cliff and Pearl streets.]" The privilege was thus expressed, "Privilege for a printing office, bindery, and book store, and steam boiler in the yard."

The Judge, at the trial, admitted, under objection, evidence of a usage among printers to use camphene for fine work, in the printing of books, and of the necessity and advantage of its use.

It appears from the evidence, that the article was used by printers in cleaning rollers, wood cuts, metal plates, and type metal, where there are engravings. Most of the witnesses speak of it as a necessary article in what is called fine work.

Some of the witnesses speak of its having been in use five years; some, six or seven; some, eight or ten; and one, that it has been in use fourteen years.

One witness says, its use has been general, in all printing offices, for nine or ten years; another says, he knows of no printers, who do fine work, who do not use camphene; another, however, says, that he cannot say that a majority of printers use it, and thinks not; another, that it is generally used by those who do fine work. The plaintiffs themselves had used it for fourteen years.

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The importance of establishing a usage, in the use of camphene, arises both from the absence of any evidence to show that when the plaintiffs applied for the insurance, they made known to the defendants that the article was used on the premises, as they were bound to have done, it being an article materially affecting the risk; and the omission of all reference to it by name in the privilege which it is contended includes its use.

The Judge submitted three distinct questions to the jury.

First—Was there a general and established usage among printers in the use of camphene for fine work in the printing of books, at the time the policy was effected?

Second—Was camphene necessary for fine work in the printing of books?

Third—If not necessary, was its use more advantageous than that of any other article for the purposes for which it is proved to have been used?

And the jury were instructed that if they found either in the affirmative, they should find a verdict for the plaintiffs for the amount of the policy.

The jury answered each question in the affirmative, and a verdict was taken for the plaintiffs subject to the opinion of the Court at General Term.

The question of how long the usage, if the jury should find it to exist, had prevailed, was not submitted to them. They have found that the usage prevailed, and that the use of the article was both necessary and more advantageous than that of any other for the purpose for which it was used in printing.

As the jury found all the questions in the affirmative, no question can arise as to which of the three formed the basis of the verdict.

It rests upon all, and if the charge of the Judge contained a correct exposition of the law of the contract between the parties, the verdict must stand, unless the omission to find how long the custom to use camphene had prevailed shall be considered fatal, or unless evidence of usage was inadmissible at all.

I am of opinion, considering the generality of the language employed in the clause containing the privilege, that the evidence was properly admitted, and I think the finding that there was a general and established usage among printers to use cam-

phene, especially under the evidence, which shows it to have existed several years, at the least, quite enough, without a special finding as to the length of time it has prevailed, to charge the defendants with knowledge of its existence.

The Judge charged, "that under the description of the subjects insured, and the privilege granted therewith, the plaintiffs are entitled to recover, although the accidental fire may have been communicated to or propagated through the camphene used and employed by the plaintiffs in their business within the description and privilege of the policy, if the jury should be of opinion that camphene is an article of usual, necessary, or advantageous use in such, the business of the plaintiffs, within the description and privilege of the policy."

It is important here to determine what is meant by the words "occasioned by camphene," as used in the eighth condition, for if they are to be construed in the sense of originating or causing of itself a fire, the condition becomes practically a dead letter.

The liquid itself can never physically originate fire—it is not self-combustible—it can only occasion a fire by being the immediate medium of its communication to other subjects. It is in this sense, therefore, that the words are to be understood, and thus read the plain meaning of the condition, is, that the company will not be responsible for a loss by fire which shall have been occasioned by means of camphene, as a medium of its communication, and which would not have happened but for the presence of that article on the premises.

The language of the charge, in which the fire is spoken of as "communicated to or propagated through the camphene," therefore correctly defines the meaning of the words in the condition "occasioned by."

The question then is, whether under the privilege contained in the policy; "privilege for a printing office, bindery, and book store," taken in connection with the subjects insured, "printing and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam engine, and machinery contained in, &c.," the defendants, with knowledge at the time of effecting the insurance, that camphene was used in the process of printing, agreed to assume the risk of a fire "occasioned by camphene,"

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against which they have expressly stipulated in the eighth condition of the policy, in other words, whether the privilege does not supersede the condition?

There are two aspects in which this question is to be considered and in which it was argued, both depending upon the proper construction of the terms of the policy.

The first is that contended for by the plaintiffs, to wit, that by permitting the business of a "printing office" to be carried on upon the premises for the purposes of which the use of camphene was necessary and advantageous, and known to the defendants to be usual and customary, they thereby, and by force of such privilege or permission, assumed, and must be held in law to have assumed the risk of a loss by fire through the medium of that article, notwithstanding they are by the eighth condition of the policy, in terms, exempted from that risk.

The other is that contended for by the defendants, to wit, that in giving the privilege, they have assented to the use of camphene to this extent, and in this sense only, to wit, that its use on the premises in the business of printing, though in itself, an article of extra-hazardous character, shall not, under other provisions of the policy, avoid the contract, but that they do not thereby intend, nor upon a proper construction of the contract, can be held to have intended to waive the benefit of the condition which exempts them from a loss occasioned through its medium. In other words, that while they permit its use, and agree to waive any forfeiture by reason of such use, they, nevertheless, will not be responsible for a loss occasioned by such use.

The question is one by no means of easy solution, nor is it perhaps going too far to say, that its decision either way will still leave some embarrassment and doubt on the mind. There are considerations which make the views entertained by the defendants extremely cogent and difficult to answer; while, on the other hand, the construction given to the contract by the plaintiffs is, to say the least, of equal plausibility and force.

It must be borne in mind that the privilege is contained in a special written clause, while the exemption is in one of the usual printed conditions.

That every stipulation in a contract should be so construed as to give it some practical operation, is a conceded rule, and it is

equally true that all the stipulations in the contract must be so construed as to harmonize, if possible.

The office of a privilege in a policy is to authorize the use of an article or an occupation on the premises, which, but for such licence, would avoid the contract. As in the present case; the business of book printing is one of the trades included in the memorandum of special rates, and to carry it on upon the premises without a special authority, would have avoided the policy.

In the license or privilege of carrying on a particular business or trade on the premises, as in this instance, that of a printing office, must properly be included all that is necessary, essential and customary in the conduct of such business. If this be so, then the use of camphene in printing is by necessary implication allowed in the privilege to print, but conceding this, the question remains—shall the company be bound for a loss by fire, occasioned by that article?

The defendants contend that by holding them exempt from liability for loss, while the privilege to use is conceded, both provisions or stipulations are fully answered, and each party obtains what he stipulated for, the plaintiffs a right to use an article which without the privilege would have avoided their contract altogether, while the defendants thus waiving the use as a ground of forfeiture, nevertheless are relieved from liability in respect to that particular article, thus sustaining in full force the terms and stipulations of the eighth condition.

On the other hand the plaintiffs say, that this construction is to make the privilege in a measure nugatory, and that by giving the privilege, the company upon every principle of sound sense and fair interpretation assume the whole risk incident to the customary and proper use of the article, and it is contended that this construction does not altogether dispense with the eighth condition, whose requirements it is said are met by confining the exemption contained therein to "a loss occasioned by camphene, in a relation or use outside of the privilege."

This latter view of the question, it seems to us, after a careful consideration of the whole subject, is the true one.

If the privilege is to be construed by the usage at all, and the usage be a reasonable use, it is to the extent of such usage,

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a limitation of, or exception from the stipulations of the condition.

So also if the privilege is to be construed in reference to what are the necessary means of securing its enjoyment, as it unquestionably must be, then it embraces all the means necessary to the business of printing, and to the full extent of such necessity is a limitation of, or exception from the terms of the condition. The condition is not, however, left a dead letter in the contract, for the moment the point of usage or necessity is passed, it becomes as operative as ever. It therefore stands for every purpose not specially excepted by the privilege.

This construction seems to us both reasonable and just, and the only one by which effectual justice will be secured.

It is contended by the defendants, that however the use of camphene in small quantities may be fairly held to be within the privilege, its use to the extent shown in the present case, cannot reasonably be held to have been within the contemplation of the parties at the time of underwriting this policy, and that therefore the exemption covenanted in the condition remains in full force.

This was made a point on the motion for a nonsuit, and it was contended that such a use of the article was "not in accordance with any known custom or usage, with notice of which the defendants were presumed to be cognizant or chargeable, and was a fact and feature in the risk which increased its hazard."

This mode of using camphene, is not, according to the evidence, confined to the plaintiffs. Williams, a printer in the Methodist Book Concern, says, they use it in that establishment as the plaintiffs do, to wit, "immerge the plates and rollers in tubs containing the article; and Brown, the superintendent of the printing department, in the American Tract Society, says that rollers are used in all printing offices."

It is a fair inference from this evidence, that this mode of using camphene is a part of the general usage or custom, and if so, it was equally within the knowledge of the defendants, as the fact of its use at all. It, therefore, was unnecessary to have made a special explanation in respect to it, on applying for the insurance, and if the use of the article at all was within the

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privilege by reason of the usage, as we have shown it was, its use in this particular mode was equally so.

Nor does it follow that the privilege, if extended thus far, is necessarily unlimited: any abuse of it would clearly defeat a recovery.

Like all other stipulations in a contract, it must not only be reasonably construed, but acted upon in good faith.

The evidence does not show that more of the article was used in the present instance, than was absolutely necessary for the purpose of the printing authorized by the privilege, and it would be hard to say, if not difficult to comprehend, that though the use of it in a smaller quantity might have been embraced within the privilege, its use in quantities adequate to the necessities of so large an establishment as the plaintiffs was not so embraced. The answer would be obvious, that the magnitude of the risks assumed, was in proportion to the magnitude of the subject, the defendants had undertaken to insure.

There must be judgment for the plaintiffs, for the amount of the verdict and interest.*

BENJAMIN F. HUNT, JR., RESPONDENT & PLAINTIFF, v. WILLIAM MOULTRIE & JANE P. HIS WIFE, APPELLANTS.

In an action, to recover the possession of family portraits, by one having a paper title from the original owner (the plaintiff's paternal grandmother); it appearing that the plaintiff had permitted his father to have the possession of them for several years, and that the latter took them to the residence of the defendants, and left them there temporarily, (one defendant being his daughter, and the other the husband of such daughter,) the plaintiff does not forfeit his right of property, because the defendants, to his knowledge, and without objection from him,

* In *Harper v. The Albany Mutual Ins. Co.* (17 N. Y. Reports, 194), on a policy against loss or damage by fire, and containing similar provisions, the Court of Appeals has construed the policy, as this Court did in the case of *Harper v. The N. Y. City Ins. Co.*

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repaired the pictures while in their possession, at their own expense, they not then claiming title, and the plaintiff not having disclaimed it.

Declarations, made by the plaintiff, tending to show that he was not the owner, though competent as evidence against him on the question of title, cannot operate as an *estoppel* to his claim of property, when it does not appear that such declarations ever came to the knowledge of the defendants, or have been acted upon by them.

The facts that; the father, in his lifetime, brought an action against the defendants, and which was pending when he died, to recover possession of the portraits, and made an affidavit that he was the owner of them, and that the plaintiff signed an undertaking in that action as surety for his father, is no bar to an action by the son, to recover the property, after his father's death, it not appearing that the son ever saw such affidavit, and it also appearing that the father was advised when he commenced such suit, that it should be brought by his son as owner, but could be maintained by the father as bailee; nor do such facts *estop* the plaintiff from claiming title as owner, as against defendants who have no claim of title, or right of possession conferred, or attempted to be conferred on them, by any one claiming to own them, or the right to have the possession of them.

(Before BOSWORTH & WOODRUFF, J.J.)

Argued, June 16; decided, July 11, 1857.

THE defendants appeal from a judgment rendered against them on the trial of the action, by the Court, without a Jury.

This action was brought, to recover the possession of seven family portraits, and of another painting, which, the plaintiff alleges, his paternal grandmother sold, and conveyed to him, by a written transfer, signed, and acknowledged by her, and in these words, viz.:

STATE OF MASSACHUSETTS, }
Watertown.

Know all men by these presents that I, Jane Hunt, widow, for and in consideration of good causes me thereunto moving, and also for and in consideration of the sum of ten dollars to me in hand paid, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto my grandson, Benjamin Faneuil Hunt, junior, all the family paintings, and also the set of prints now in my house at Watertown, of every kind and nature, to have and to hold the same to him and his assigns for ever, upon the trust nevertheless, and to and for the uses following, and for no other.

First.—For my use during my life.

Second.—At my death, for the sole use and behoof, and at the

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disposal of my said grandson, in the confidence that he will keep and dispose of them as family memorials in his discretion, and so use and dispose of them that they may never be sold or disposed of out of his family. Witness my hand and seal, this twenty-seventh day of September, one thousand eight hundred and forty-three.

JANE HUNT. [L. S.]

The complaint further averred, that Jane Hunt died at Watertown, on the 5th of July, 1854. The paintings were soon removed to Col. B. Hunt's residence in South Carolina, he being plaintiff's father, and left in his possession and control, till after he removed to the city of New York in 1853, and until March, 1854, when he removed them to New York, and having then no residence of his own, he left them temporarily with William Moultrie for safe keeping, his wife being a sister of the plaintiff. Moultrie refused to give up the paintings, and kept them concealed. It also alleged, that no recovery in damages would be a compensation, and prayed for a restoration of them, and for the appointment of a receiver to take possession, *pendente lite*.

The defendants, by their answer, put the material allegations of the complaint at issue, and also alleged that B. F. Hunt, senior, in and before 1843, owned the portraits, and in consideration of natural love and affection, and for a valuable consideration, gave and presented them, as a free and voluntary donation, to the defendant, Jane B. his daughter, and the wife of William Moultrie, and that the plaintiff, until about the time of bringing this suit, never claimed any title, but on the contrary disclaimed it.

The action was tried in June, 1856, before Mr. Justice HOFFMAN, without a Jury.

On the trial the execution and delivery of the instrument of the 27th of September, 1843, its acknowledgment, and the identity of the portraits in question, were proved.

Witnesses were examined, in relation to the portraits, by whom they had been controlled, and where they had been kept before and after the death of Jane Hunt; and as to acts, and declarations of the plaintiff, in respect to his ownership, and

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their testimony, so far as it is material, is noticed in the opinion of the Court.

It appeared by evidence given by the defendants, that in June, 1854, B. F. Hunt, Senior, brought an action in the Supreme Court against William Moultrie & Francis L. Bechet, to recover possession of these portraits. To obtain the possession of the portraits in that action, B. F. Hunt, Senior, made the following affidavit:

SUPREME COURT.

BENJAMIN F. HUNT, Senior,
against
WILLIAM MOOTRY & FRANCIS L. BECHET.

} Affidavit on claim
of delivery of per-
sonal property.

City and County of New York, ss.:

Benjamin F. Hunt, senior, plaintiff in this action, being duly sworn, says, that he is the owner of the following personal property claimed in this action, that is to say: six family pictures, being the portraits of the ancestors of the plaintiff, by her last will and testament, to Benjamin F. Hunt, Junior, and son of the said plaintiff, for the use of the plaintiff, and who has held the possession of the same for twenty years; that the said property is wrongfully detained from the plaintiff by William Mootry and Francis L. Bechet, the defendants herein. That the alleged cause of the detention thereof according to this deponent's best knowledge, information and belief, is as follows: The said William Mootry was the bailee of the said pictures, the same having been recently left in his possession to keep for the plaintiff until called for; and the said Mootry delivered the possession thereof, or some of them, without the knowledge or consent of the plaintiff, to the said Francis L. Bechet, upholsterer, No. 420 Broome street, New York, to clean for him; that the said property has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, and that the actual value of said

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property, according to the best knowledge and belief of this deponent, is five thousand dollars

BENJAMIN F. HUNT.

Sworn this 24th day of }
June, 1854. }

J. M. BALDWIN,
Commr. of Deeds.

It did not appear that the plaintiff ever saw this affidavit, or knew its actual contents. But it appeared that he signed an undertaking in that action, as surety for his father, which recites that his father, the plaintiff therein, "has made an affidavit that the defendants wrongfully detain certain personal property, &c., and the plaintiff claims the immediate delivery of such property, as provided for," in chap. 2 of the 7th title of the Code.

The defendants in the present action, put that affidavit, and undertaking, and the complaint in that action in evidence.

That action was at issue and on the calendar, when B. F. Hunt, Senr., died.

It was proved by the attorney who brought that action, that he "advised the suit to be brought by his son," (the plaintiff), "as owner of that property," and that Col. Hunt, the father, insisted "he would bring it as bailee," and the attorney "advised him he could do so."

The defendants objected and excepted to the admission of this evidence.

Justice HOFFMAN decided as follows:

This action having been brought to trial at the Special Term without a jury, it is now found and declared that the plaintiff is the owner of the eight several pictures, mentioned or intended in the complaint, being: 1. Portrait of Madame Ann Bureau; 2. Portrait of Andrew Faneuil; 3. Portrait of wife of Andrew Faneuil; 4. Portrait of Peter Faneuil; 5. Portrait of Benjamin Faneuil; 6. Portrait of wife of Benjamin Faneuil; 7. Portrait of Col. Benjamin F. Hunt by Stuart; painting representing fire-arms and shooting tackle; and is entitled to the immediate possession thereof, and that neither of the defendants has any title to, or interest in the said pictures, or any of them; and it is

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therefore ordered and adjudged, that the said defendants, and each of them, do forthwith deliver to the said plaintiff, or to his attorney, each of the said eight pictures to be held by the said plaintiff, as his property, under the bill of sale set forth in the complaint; and that the said defendant William Moultrie pay to the plaintiff, or his attorney, &c.

There was no evidence that J. B. Hunt, Senr., ever attempted to give or sell to Jane B. Moultrie, the portraits, or any interest therein.

From the judgment entered, the defendants appealed to the General Term.

E. W. Stoughton, for appellants.

D. D. Field, for respondent.

BY THE COURT. BOSWORTH, J.—By an instrument in writing signed by Jane Hunt, and sealed with her seal, dated the 27th of September, 1843, acknowledged before a proper officer and delivered, and for a pecuniary consideration; Jane Hunt, sold and conveyed the paintings in question to the plaintiff.

The only respect in which the sale and transfer came short of a sale absolute in all respects, *in presenti*, is, that by the terms of the instrument, the defendant was to hold them for the use of the grantor during her life. She died on the 5th of February, 1844. The title passed at the time, but the purchaser's possession of them during her life, was to be such that she might have such use and enjoyment of them during that time, as the nature of the property could, when thus owned and held, be made to furnish.

The defendants claim that the paintings are the property of Jane B. Moultrie, one of the defendants. They claim title from Col. Hunt, the father of said Jane B. and of the plaintiff.

There is not the slightest evidence, that Col. Hunt ever attempted to give or sell the paintings to Jane B. Moultrie, or convey to her any right to, or interest in them, or that he claimed to be competent to do so.

The defendants show no title, and the plaintiff, if he fails to recover, notwithstanding he shows a good paper title, must fail

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by reason of his being a party to an undertaking, as surety for his father, in an action brought by the latter in June, 1854, to recover these paintings.

The undertaking itself does not recite that Col. Hunt was owner of them, but merely "that the defendants wrongfully detained" them, and that, he claimed "the immediate delivery of such property."

There is no evidence that the plaintiff in this action, read the affidavit referred to in that undertaking. The counsel under whose advice Col. Hunt commenced that action, "advised the suit to be brought by his son as owner of the property." "Col. Hunt was vexed with Moultrie; and insisted he would not bring the suit in his son's name. That he would bring it as bailee." The counsel "advised him he could do so."

After the plaintiff's grantor had died, he went to her then late residence for the paintings, and took them away.

I should conclude, from the whole evidence, that the plaintiff, after the death of his grandmother, had the paintings taken to his father's. That, for his gratification, the latter was allowed to retain possession of them; and that, in this way, they were placed in the house of the defendants, who commenced house-keeping in the fall of 1853.

In February, 1854, or about that time, Col. Hunt went to the defendants, to reside with them, and continued there until April.

It is during this time, as the defendants claim, that Col. Hunt gave the paintings to his daughter, Jane B. Moultrie.

Col. Hunt left the defendants in or about April, 1854, and went to the residence of John A. Weisse, where he staid about six weeks. He went from that place to the plaintiff's house, and staid there until he died.

The papers in the replevin suit commenced by Col. Hunt were put in evidence by the defendants.

Those papers bear date the 24th of June, 1854, and contain a sworn statement of Col. Hunt, that he left them with William Moultrie, as his trustee, to be kept for the plaintiff until he called for them.

The complaint in that suit, which is verified, states that Moultrie and Bechet wrongfully detained these portraits from Col. Hunt.

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On a careful consideration of the whole evidence, we think the finding of the Court at Special Term, that "the plaintiff is the owner of the eight several pictures mentioned," in the complaint, should not be disturbed by us.

It having been found that the plaintiff was the owner of the property, and the defendants showing no right to the possession of them, the plaintiff had a right to insist that they should be delivered into his possession.

But it is urged in behalf of the defendants, that the plaintiff is estopped from claiming title, for the reasons—first, that he has asserted the title to be in another; second, because he has stood by in silence and seen a third person making repairs to and expending money on the pictures; and third, because he allowed such repairs to go on without asserting his own title.

A declaration that the property belonged to another, would be strong evidence against the plaintiff, but would not of itself conclude him. (*Wallis v. Truesdel*, 6 Pick. 457; *Maybee v. Sniffen*, 2 E. D. Smith, 1.)

Palmer does not testify, that in the conversation of which he spoke, Moultrie claimed title or ownership, or that the plaintiff disclaimed it. The remark, that "Moultrie was foolish in spending money on the pictures in repairing them," in the absence of any claim of right by Moultrie, and of all evidence of title on his part, should not bar the plaintiff from asserting title.

The statement of the plaintiff, testified to by George H. Moultrie, was not communicated to the defendant, and cannot, therefore, be said to have influenced his conduct.

It is not operating to his prejudice, or as a fraud upon him, to allow the plaintiff to prove that, in truth, he was the sole, absolute owner.

If there was any evidence that Col. Hunt had sold or given the paintings to either of the defendants, and that the plaintiff knowing this, or that the defendants believing themselves to be owners, were expending moneys to repair them, and that, knowing this, the plaintiff had suffered such expenses to be incurred, without interposing a claim of title, a different case would be presented.

But there is an entire absence of any evidence to show that the defendants ever supposed they had any title, or that

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the plaintiff, to their knowledge, ever disclaimed ownership, or asserted the title to be in another.

We think that nothing was proved by the defendants which estopped the plaintiff from asserting and proving the title to be in himself, and that the finding by the Court, that he was the actual owner, is not so clearly against evidence as to justify us in granting a new trial on that ground. Mr. and Mrs. Weisse prove satisfactorily that there were eight pictures, and sufficiently identify them.

The judgment should be affirmed.



ROBERT J. MURRAY v. JACOB SHARP, THE MAYOR, &c., OF
THE CITY OF NEW YORK, and OTHERS.

When, by an ordinance of the Corporation of the City of New York a pier is directed to be built or extended, the payment by the Corporation of one-third of the expense is, under the statute, a condition precedent to the acquisition by the Corporation of a right to receive half of the wharfage, and the burthen of proving the payment rests upon the Corporation. The statute does not contemplate that the Corporation shall pay one-third of the expense in advance of the improvement, but it does require that its election, to make such payment, shall be made before the work is begun, and that the payment shall be made within a reasonable time after the work is completed. Hence, if the whole expense of the improvement has been borne by private owners who, for years, have received the whole wharfage, the Corporation cannot, by offering to pay one-third of the original expense and interest, place itself in the same position, and acquire the same rights, as if such payment had been made in due season. Its right, by making the payment, to acquire a share of the wharfage, is extinguished.

When the private owners of a pier have an exclusive right to the wharfage, the Corporation cannot legally deprive them of this right, by appropriating the slip, adjoining the pier, to the purposes of a public ferry.

If such a power may be exercised by the Corporation, it can be so only upon the payment to the owners of a just compensation.

Judgment for plaintiff affirmed with costs.

(Before DUEK, BOSWORTH & SLOSSON, J.J.)

Heard, March 11; decided, July 11, 1857.

APPEAL by defendants from a judgment in favor of the plaintiff. The action was brought to restrain the defendants

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from interfering with the exclusive rights of the plaintiff as owner of pier No. 16, in the city of New York. The defence was, that the slip adjoining the pier had been lawfully granted, and was lawfully used as a public ferry, and that there was no other interference than was thus occasioned.

The judgment of the Court at Special Term contains a recital of the facts found by the Judge, and his conclusions of law therefrom. It is in the words following:

“At a Special Term, held at New York, on the twenty-third day of January, 1855:

“Present,—The Hon. John DUER, Justice. ●

“This cause coming on to be tried at a Special Term, without a Jury, and on hearing Messrs. John Sherwood and Samuel Sherwood, of counsel for the plaintiff, and Mr. R. J. Dillon, of counsel for the defendants the Mayor, Aldermen, and Commonalty of the city of New York, and Mr. D. D. Field, of counsel for the defendants Jacob Sharp, Freeman Campbell, and Rutherford Moody; and it appearing to the Court that John Murray, Jr., the father of the plaintiff, acquired, by virtue of the grant of May 10th, 1797, to said John Murray, Jr., the right of wharfage to the wharf fronting on the East River, constructed by him, in front of his premises, and in front of the side wharf, at the foot of Wall street, being the wharfage of 98 feet; that under the ordinances of the Corporation of the city of New York, set forth in the case, he constructed the original pier, now known as pier No. 16 East River; that, in like manner, he constructed the first extension of said pier in or about 1816.

“That the plaintiff, in like manner, constructed the second extension in 1840, and that in like manner he constructed the third extension in 1850; and that no portion of the expenses of constructing the said wharf, or the successive extensions thereof, has ever been paid or tendered to be paid by the said Mayor, Aldermen, and Commonalty previous to the commencement of this action. That the plaintiff has, by devise and purchase, become the sole successor to the rights of his father, the said John Murray, Jr., and that the said John Murray, Jr., in his lifetime, and the plaintiff, as his successor, always received the wharfage, and exercised acts of ownership of said pier. That

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the Mayor, Aldermen, and Commonalty of the city of New York, have acquiesced in the possession and ownership of the said John Murray, Jr., and the plaintiff, as his successor; that on the 1st of July, 1852, the defendant Sharp received from the said Mayor, Aldermen, and Commonalty of the city of New York, a lease of the slip at the foot of Wall street, or so much thereof as belonged to the said The Mayor, Aldermen, and Commonalty of the city of New York, together with the northerly side of pier 15, and the privilege of establishing and running a ferry from Wall street aforesaid to Brooklyn, a copy of which is annexed to the answer, and that the said defendants Campbell and Moody afterwards acquired one-half the interest of the said Sharp; and the said Sharp, Campbell and Moody thereupon proceeded to take possession, and use said slip for ferry purposes, entirely destroying the wharfage of said pier No. 16, on the southerly side, and outer end thereof. And it appearing to the Court to be a just conclusion of law, from the facts above stated, that the plaintiff is entitled to the relief demanded in his complaint:

“Now, on motion of J. and R. H. Sherwood, attorneys for the plaintiff, it is hereby ordered and adjudged, and this Court doth order and adjudge, that the right and title of the said plaintiff, Robert J. Murray, is hereby fully and absolutely established to the wharfage of the whole pier No. 16 East River, in the city of New York, together with all and all manner of cranage, slipage, profits, benefits, advantages, and emoluments growing, arising or accruing from said pier, or from any part thereof, or by or from the northerly side of the slip, at the foot of Wall street, between piers Nos. fifteen and sixteen, and adjacent to said pier No. sixteen. And it is further ordered and adjudged, that the defendants Jacob Sharp, Freeman Campbell and Rutherford Moody, their agents, servants, and all others acting through or under them, be, and they are hereby perpetually enjoined from constructing, building or erecting any bridge, fenders, or other erections or obstructions, in or upon the northerly side of the slip aforesaid, adjacent to said pier No. 16, and from taking possession of, or occupying the same, or from doing any other act by means whereof vessels may be prevented from having uninterrupted and free passage to and from pier No. 16 on the southerly side or the end thereof, or from having the free and

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uninterrupted use and occupation of the berths on said southerly side and end of the said pier.

"And it is further ordered, adjudged and decreed, that the said plaintiff have judgment against the said defendants Jacob Sharp, Freeman Campbell, and Rutherford Moody, for the sum of two hundred and seventy-three $\frac{1}{10}$ dollars for his costs and charges, and that he have judgment against the said The Mayor, Aldermen, and Commonalty of the city of New York, for the sum of seventy-seven $\frac{1}{10}$ dollars for such of the aforesaid costs and charges as have accrued to the plaintiffs since the eighth day of April, 1854, when the said The Mayor, Aldermen, and Commonalty of the city of New York were made parties defendants."

All the material parts of the evidence given on the trial are stated in the opinion of the Court at General Term.

D. D. Field, for defendants, Sharp, Campbell, and Moody, appellants, denied that the plaintiff had made out any title, by prescription or otherwise, to the pier in question or its extensions. The ordinances of the Common Council under which the extensions were made, he insisted, were all made with the evident design, apparent on their face, that the city should contribute to the expense, and thus acquire a right to the side wharfage, and that it must be presumed that these ordinances were conformed to; and if so, they were a full defence. He further insisted that even if the resolutions had not been conformed to, the city was not concluded, by the negligence of its agents, from now asserting its rights. An account may be taken as between the plaintiff and the city, of the expenses and receipts, and the city be charged with its share of the expenses. And that if it had been shown that the plaintiff, or his predecessor, had become entitled to the exclusive right to the inside wharfage, that must be deemed to be held in subordination to the rights of the city to fill the slip, or use it for the purposes of the city.

The grant or license to him would, in that case, be construed as a grant or license to receive the wharfage of the slip, so long as it was not wanted for city purposes and no longer. (*The Mayor, &c., v. Whiting*, 7 Barb. 485.)

R. Busted and *M. V. B. Wilcoxson*, for the Corporation, made

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it a point, that the Superior Court has no general or special equity jurisdiction, and that it is beyond the power of the legislature, under the Constitution, to confer such jurisdiction.—Constitution, 1846, Art. 14, § 12; Art. 6, §§ 3, 5, 10, 14; *Reubens v. Joel*, 3 Kern. 488.

The other points argued by the counsel were substantially the same as those for the other appellants.

John Sherwood, for the plaintiff, contended, upon the proofs which he examined in detail, that the plaintiff had made out a clear and full title to the pier and its extensions, and the wharfage arising therefrom; and that, if any grant was necessary, the Court was bound to presume that a grant had been made (3 Kent's Com. 442, and cases there cited), and that the rights of the plaintiff could not be abrogated or infringed by a ferry license from the Corporation to the other defendants, nor was it probably the intention of the Corporation to infringe them, as the lease to Sharp was only for so much of the slip as belonged to the Corporation, thus showing that the Corporation did not claim the whole, and giving full notice to Sharp of the plaintiff's rights. The counsel also insisted that, if the Corporation has, by its charters, the right of granting and establishing ferries, it is in subserviency to the right of eminent domain, which the State may regulate by statute; and land for ferry uses, whether belonging to the State or private individuals, can only be obtained by just compensation.—*Pipkin v. Winns*, 2 Dev. N. C. Rep. 408.

The lessee of the ferry cannot use it, without being the owner of the land, or obtaining a right of "way, public or private."—*Peter v. Kendall*, 6 Barnwell & Cress. 703; 3 Kent's Coms. 420, note d.

And, in conclusion, that the construction of South street, the grant of wharfage for 98 feet of bulkhead, the construction of the entire pier, at the times and in the manner directed by the Corporation, wholly at the plaintiff's expense, and the use and possession of the pier, as made for fifty years, under claim of right acquiesced in by the Corporation, with full notice to Sharp, conclude and estop both the Corporation and Sharp from denying the plaintiff's right to the pier, and a range of berths upon the southerly side.—3 Kent's Coms. 442–445; *Corning v. Gould*,

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16 Wend. 531-535; 17 Wend. 564, and cases cited; *Embury v. Connor*, 8 Coms. 518; 5 Sandford, 17.

BY THE COURT. SLOSSON, J.—The action is brought to establish the ownership and possession of the plaintiff in the pier No. 16, East River, at the foot of Wall street, and to restrain the defendants, Sharp, Campbell, and Moody, in making the necessary erections for the purposes of the ferry recently granted to Sharp by the Corporation, from so approaching the pier as to interfere with the access of vessels to the berths usually occupied by them alongside the pier, and thus deprive the plaintiff of his rights of wharfage.

The plaintiff claims title to the pier, as devisee under the will of his father, John Murray, Jr., in respect to one-third, and as purchaser from the devisees of the other two-thirds.

The defendants, Sharp, Campbell, and Moody, claim title to the use of the entire slip between piers number 16 and 15, for the purposes of a ferry, under a lease from the Corporation to Sharp, dated the first day of July, 1852, for a term of ten years, whereby the slip at the foot of Wall street, with the northerly side of pier number 15, is demised to him for the term aforesaid, with the right to establish a ferry from that point to Brooklyn.

In the granting clause of the lease is this qualification: "or so much thereof (the slip) as belongs to the parties of the first part" (the Corporation); and while the "northerly side of number 15" is granted in terms, no reference whatever is made to the pier in dispute, number 16, which forms the corresponding northerly boundary of the slip.

On the 10th day of May, 1797, the Corporation made a grant to John Murray, Jr., as proprietor of the upland, of a water lot in front of his land, at the north-easterly corner of Wall street, and what is now South street. By the terms of his grant he was to construct South street, of 70 feet in width, and a wharf in Wall street of 25 feet in width, fronting the basin or slip which at that place ran up into the town. The lot granted, exclusive of the street, was 73 feet in width, fronting on South street, and the whole bulkhead in South street, including the wharf to be built by him on Wall street, was 98 feet in extent, and the Corporation covenanted that on his building said streets and

wharfs he should be for ever entitled to the wharfage from the wharf fronting the East River, which would be 98 feet as aforesaid.

Pier Number 16 was originally constructed by John Murray, Junior, at his own expense, under an ordinance of the Corporation, passed on the first day of June, 1801, under authority of the Act of the Legislature of April the 8d, 1798, entitled "An Act concerning certain Streets, Wharves, and Piers," &c.; re-enacted the 8d day of April, 1801. It was constructed at a point of the bulkhead 22 feet 11 inches northerly from the junction of Wall street and South street.

By the act in question, the Corporation were authorized to direct piers to be sunk, &c., at the expense of the proprietors of the opposite lots; and it was provided, that if the said proprietors should refuse or neglect to construct the piers, according to the directions of the Corporation, that body might itself construct them at their own expense, and would then be entitled to receive the wharfage to accrue therefrom, to their own use, by way of compensation.

An additional section was added to the act, as re-enacted in 1801 (section 7), by which it was provided, that it should be lawful for the Corporation to grant to the owners of the lots fronting on the streets, &c., "a common interest in the piers to be sunk in front of each street, in proportion to the breadth of their respective lots, under such restrictions and regulations, and within such limits," as to the Corporation should seem just.

By the ordinance of the first day of June, 1801, the owners of lots fronting on South street, between Wall street slip and Fly Market slip, were ordered to make and complete a pier on the northeast side of Wall street, within a certain time, "on doing which the Corporation would grant the piers to the owners of said lots, reserving in the said grant the exclusive right in the Corporation of wharfage and slippage on the side of each pier adjoining a public slip."

The pier was constructed by Murray, but no grant was in fact ever made of it to him.

In 1804 the Corporation brought an action for money had and received against one Richard Scott, who had received the wharfage from the pier under a right derived from Murray, to

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recover the proportion of it derived from the southerly side of the slip; but the Supreme Court, without deciding the question of the defendant's title, held that the Corporation had made no title in themselves, as from the form of the action they were bound to have done; that the Corporation could not establish any right to the wharfage in themselves, inasmuch as the land on which the pier was erected, had never been granted to them by the Legislature, (it lying outside of the 400 feet granted to the Corporation by the Montgomery Charter,) nor was the soil under water, over which the vessels lay, in the Corporation; and that no grant could be implied from the terms of the Act (1798-1801); that the Corporation could only grant as attorneys for the public, in case piers were sunk, and that the authority given them by the Act, to impose restrictions and regulations in making the piers, did not give them the right "to reserve the wharfage to themselves, which was to be theirs only in case of default in the owners of the lots in sinking the piers," and that the reservation of that right in the Ordinance of the first day of June, 1801, made no difference, and was not binding on the defendant—no grant containing such a reservation having been in fact made to Murray; that the right to sink piers was a right secured to the owners of the opposite lots by the acts in question, and which could not be impaired by mere resolutions of the Corporation, to which such owners were not parties; and judgment was given for the defendant. (1 Caine's R. 548.)

The pier, as originally constructed, was about 180 feet in length.

In 1806, the Legislature passed an Act, in relation to wharves, slips, &c., by which it was, among other things, enacted (section 2), that in all cases where the Corporation should think it for the public good to enlarge any of the slips in the city, they should have power to do so, "and upon paying one-third of the expense of building the necessary piers and bridges, shall be entitled not only to the slippage of that side of the said piers which shall be adjacent to such slips, but also to one half of the wharfage to arise from the outermost end of the said piers."

In *Marshall v. Vultee*, 1 E. D. Smith's Common Pleas Rep. 806, it was held that the expression, "enlarge any of the slips," &c., applied as well to their extension into the river as to their

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widening, and the same construction was given to the expression, in *Thompson v. The City, &c., of New York*, (3 Sandford R. 487).

In 1816 the pier was extended 70 feet, under an act of the Common Council. In the Report of the Committee of the Board, on the subject of this extension, it is added, "one-third of the expense will of course be borne by the Corporation."

The case does not show by whom the expense of this extension was paid; but it is certain that the Corporation paid no part of it, and every presumption is in favor of the whole having been paid by Murray.

In 1840 the pier was further extended 77 feet by resolution of the Common Council, which also embraced the extension of six other piers on the East River.

In the Report of the Committee of the Board of Aldermen on the subject of this extension, it is said that "two of the aforesaid piers (numbers 16 to 23 inclusive) are private property. Three are owned by individuals and the Corporation jointly, and two are the property of the City exclusively," but does not designate which are thus distinctly owned.

It appears that in the fall of 1850, about two years before the commencement of this suit, the maps in the Street Commissioner's office, on which these piers are designated, one of which is that of Daniel Ewen, of January the 1st, 1849, were colored, so as to distinguish between those which were owned by individuals, and those owned, in whole or in part, by the Corporation; the private piers were colored blue, and those in which the Corporation were interested, brown. Pier No. 16 was colored blue. The coloring was done by order of the Street Commissioner.

This fact would not in itself be conclusive as a recognition by the Corporation of Murray's title in the pier in question; but, in connection with other facts, it is important in showing what was the general understanding in respect to the nature of the ownership.

In a map of Dougherty, made in 1828, on file in the Street Commissioner's office, and, of course, made long after the first extension, a space of 22 feet 11 inches is reserved along the southerly side of pier Number 16, and marked "one range of berths, private."

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In the bills for taxes for piers Numbers 16, 17, and 18, for the years 1851 and 1852, made out against Murray and others, they are charged for the whole tax on Nos. 16 and 17, and for only one half of that on No. 18, in which latter pier confessedly the Corporation are interested to that extent.

The pier was again, and for the last time, extended, with ten others, in 1850, by order of the Common Council, and \$12,000 appropriated "to defray the proportion of the expense to be borne by the Corporation."

In the Report of the Committee of the Board of Assistants on the subject of this extension, it is stated that the Corporation are interested only to the extent of a half interest in four of these piers, and the appropriation of \$12,000 must be held to have been applicable to those piers only.

By the Resolution of the Common Council referred to, this last extension was directed to be made "by the proprietors" of the piers, under the direction of the Street Commissioner.

Both of these extensions of Pier Number 16 were made by Murray. The contract for the extension of 1840 appears to have been made with the Street Commissioner, and that for 1850, with Murray. Murray paid for both extensions.

Dubois, one of the contractors for both extensions, says, he thinks the Corporation did not pay for any part of the contract for 1850, and he does not know that they paid for any part of the extension of 1840, though he says they did pay for a part of Number 18.

The evidence of Hussey is very conclusive, that the contracts for the extension of 1850 were made with the proprietors, and that they paid all the expense, and the Corporation none of it.

There is no evidence to show that the Corporation ever paid or offered to pay one-third or any portion of either of these extensions.

From the time the pier was first built up to 1811, the entire wharfage was received by Murray—it was collected and paid to him by Thompson, the wharfinger.

Thompson was succeeded as wharfinger by Jacob Frost, who died in May, 1838. William Frost succeeded Jacob, and acted as wharfinger until 1850, when he was succeeded by Stephen A. Frost. Stephen acted under Jacob one year before his

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death, and under William during the whole of his period, and since 1850 has acted as sole wharfinger; and he swears that during the whole of that time the wharfage of one tier of berths had been collected and paid to the proprietors.

It does not, it is true, appear to whom Jacob Frost paid the wharfage during the period up to one year anterior to his death, but the Corporation never made any claim to the wharfage after his death, and none of it was ever paid to them during Thompson's time; and the inference, as one of fact, is, I think, irresistible, that the wharfage during that period was paid to Murray, as owner.

The expense of dredging the slip, made by order of the Corporation, was on one occasion at least, before 1850, paid for by Frost, and the taxes for the whole pier have been paid for out of the collections of wharfage, at least since 1833.

The wharfage was collected from all sides of the wharf, and on the outer end.

The ordinance for filling up Old Coffee House Slip (which ran up into the town), was passed in 1833, and by Map of Ewen of January the 1st, 1849, before referred to, it appears that the filling up extended to a considerable distance outwardly beyond the eastwardly line or bulkhead of South street, into the space between the piers, except as to a strip of some feet in breadth, next to the Pier No. 16, which is left open from the said outward line or bulkhead of the street.

This is the space, undoubtedly, which is marked 22 feet 11 inches, being the portion of the bulkhead of South street, built by Murray, which lay south of the pier originally constructed by him.

As the bulkhead on the old slip in Wall street was to be 25 feet in width, the commencement of the pier at 22 feet 11 inches from the southerly line of that bulkhead, would make the southerly line of the pier to be opposite the bulkhead in Wall street, and not opposite to the lot conveyed to Murray by the grant of 1797, at the point where it abuts on South street; and the counsel for the defendants claim that the Corporation could not give authority to erect the pier at such a point, their authority under the Act of 1798 extending only to the giving of a license to erect a pier opposite to the lots of the proprietors at whose expense it is to be built.

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The counsel for the plaintiff, in reply, says, that though this may be literally true in respect to the portion of Murray's lot at the corner of South and Wall street, it does not follow that the southerly line of the pier is not opposite the lot, since the line of Wall street tends outwardly or widens as it approaches the river, and that a line drawn perpendicularly from the rear of the lot would include or strike the southerly line of the pier.

If this be so, it puts an end to this objection. It is, moreover, an objection which is not entitled to much favor, after an undisturbed possession of the pier by Murray and his descendants of over fifty years.

On a review of all the facts, it is clear that the plaintiff has a good title to the pier with its extensions, as against the Corporation.

He and those under whom he claims have been in the exclusive possession of the original pier, receiving to their own use its entire emoluments, from the period of its first construction in 1802, to the time when this suit was commenced, being all of 50 years, and claiming all the time to be, and acting as, the sole owners thereof—they have also been in the exclusive possession of the first extension, and in the receipt of its wharfage, under like claim of exclusive ownership, since 1816, a period of 36 years before the commencement of this action.

In respect to the two last extensions, it is true that the possession is not yet of sufficient duration to constitute a title by prescription, but I do not think the plaintiff's rights depend on establishing a prescription; the pier with its extensions was lawfully constructed by the plaintiff and those under whom he claims, under an authority of an Act of the Legislature, which gave them the right so to construct it, and under the sanction and licence of an ordinance of the Corporation made in pursuance of such Act. The Corporation have no title in the lands on which the pier is built, and it is not necessary for the plaintiff to establish an adverse possession as against them. The length of time during which the plaintiff has enjoyed the original pier and the first extension, is not referred to as showing he has a good prescriptive right to the pier, but as showing that his claim of exclusive ownership has never been disputed by the Corpora-

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tion, and that after such a lapse of time there is no equity in allowing them now to set up a hostile one.

A like equity in favor of the plaintiff, though not strengthened by so long a possession, exists in respect to the two last extensions. The Corporation not only did not offer to contribute any portion of the expense of their erection, but allowed the plaintiff to construct them both at his sole expense, and to enter into possession as exclusive owner, and take to his own use exclusively the entire wharfage—the extensions from the time they were made became part and parcel of the original pier, and the Corporation, well knowing the plaintiff's rights in the latter, allowed him to continue in the exercise of the same rights of ownership in respect to the extensions, which he had exercised in respect to the original pier.

The Corporation, unless they had built the pier exclusively at their own expense, on a refusal by Murray to unite in its construction, could never have acquired a right to any portion of the wharfage, except on the condition of paying one-third of the expense of its construction. They have never either paid or tendered payment of one-third or any portion of the expense of either extension.

They now, however, claim the right to make such payment, and to have an account from the plaintiff in respect to the wharfage to which they would have been entitled, had they made the payments in time. This claim is wholly untenable.

The Acts of 1798, 1801, and 1806, admit of no such construction.

The Act of 1806 plainly contemplates an election both on the part of the Corporation and the individual owners of the lots, at whose expense the piers are to be constructed or extended, and that such election should be made at the time the improvement is to be made—not afterwards; and it makes the payment of one-third of the expense of the improvement by the Corporation a condition precedent to the right to any portion of the wharfage, if the private owners actually consent to build it.

The Corporation have the election to pay one-third of the expense, and on such payment to take to their own use one-half the wharfage.

The private owners have an election to unite or to refuse to

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unite in the construction. If they elect to unite, but the Corporation does not elect to pay the one-third of the expense, the private owners may construct the whole at their own expense, and take the entire emoluments. If they so elect, and the Corporation also elects to pay its one-third, each takes one-half of the wharfage. If the private owners refuse altogether to contribute to the expense, the Corporation may build the whole, and take the whole wharfage, cutting off all previous rights of wharfage which the private owners may have had, or perhaps under Section 3 of the Act of 1806 may grant the right to construct the pier, and receive the profits thereof, to others.

If a portion of the owners consent to unite, and others do not, the Corporation may, under Section 4 of the Act of 1806, unite with those who do consent, and entitle themselves to the proportion of the wharfage which would otherwise have gone to the parties refusing.

The whole policy of the Act requires this election to be made in reference to the improvement, as one to be made, and before it is made.

The statute does not, we think, contemplate that the Corporation should pay the one-third of the expense in advance of the improvement, but rather that the whole expense is in the first instance to be borne by the private owners; but it clearly contemplates that the election should be made before the work is begun, and if made that the payment should follow within a reasonable time after it is completed. That it contemplates such an election to be made before the work is entered upon is clear from this, that the private owners may be wholly or greatly influenced in making their own election, according as they are assured that the Corporation will or will not bear any portion of the expense.

Now it is claimed in respect to the first extension, that of 1816, there was a declared election on the part of the Corporation contained in the report of the Committee, upon which the ordinance which directed the work to be done was passed, and to be found in these words, "one-third of the expense will of course be borne by the Corporation."

The report having been adopted, this was undoubtedly a declaration on the part of the Corporation, of an intention to

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pay their proportion of the expense; but nearly forty years have elapsed since it was made, and no tender has ever been made of it, or of any part of it, and no claim interposed under or by virtue of it; and it must be assumed after a forty years' acquiescence in Murray's receipt of the wharfage, without claim on their part, that the election has been wholly abandoned.

The statute contemplates an effective election—an election to be followed up by payment, and it is not until the payment is actually made, or tendered, that the right to the wharfage accrues. Moreover, the Corporation, by making the lease to Sharp, have precluded themselves from any benefit, if they had any, to be derived from this bygone election, and from any benefit of an election which they might now make, if entitled to make it. The object of the statute in giving the election to the Corporation at all, was to entitle them, in case of its exercise, to half the wharfage; but the whole slip having been let to Sharp for the purpose of a ferry, all right to receive wharfage from the pier, and all ability to earn it, would be gone.

Sharp, by his grant from the Corporation, acquired no better title than the Corporation possessed. The terms of his grant are significant—the grant is of so much of the slip as belongs to the Corporation, together with the northerly side of pier No. 15.

Nothing could be a stronger disclaimer on the part of the Corporation, so far as Sharp's rights are concerned, of any right to the opposite pier No. 16. He took with full notice that the Corporation made no claim to any portion of the latter pier, and he acquired only such a right in the slip as his grantors had the right to convey. If, as against the plaintiff, the Corporation had no right, they could give none to Sharp.

Judge Hoffman, in his valuable "Treatise upon the Estate and Rights of the Corporation of the city of New York as Proprietors," at page 129, states it as a valuable rule in the construction of the terms of a Ferry Grant, supported by authority, that "in ascertaining the limits of the grant and in construing the grant, the rule applicable to grants by individuals is reversed, and the implication is against the grantee. The language is to be strictly construed, so that nothing shall pass unless clearly intended, and by language plainly competent to pass it."

The defendants, however, contend that even if Murray had an

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exclusive property in the pier and the wharfage incident thereto, he held it in subordination to a paramount right in the Corporation to appropriate the slip at any time to the purposes of a public ferry. They, the Corporation, allege in their answer, that it has hitherto been the invariable practice in the city of New York for the grantees and owners of piers, whenever they have received wharfage for the sides of such piers, to do so in subordination to the rights of the Corporation at pleasure to control, occupy, use, or fill up the adjoining slips, and thus to cut off the future receipt of the wharfage—that in such cases the receipt of the wharfage has been permitted by them only while the slips were not used or taken by them, or granted to others, and that so soon as the slips were used, taken, or granted by the Corporation, the authority or permission to receive such wharfage ceased.

If this is an allegation of a custom acted upon by other grantees of piers, &c., we can only say, it is a custom which does not bind or conclude the plaintiff.

If it is an allegation of the relative legal rights of the parties, that is the question which we are now to consider.

That the absolute and exclusive right of establishing, maintaining, and regulating public ferries from the Island of New York to adjacent places, is, under the several charters of the city and the laws of the State, vested in the Corporation of the city, is beyond all doubt.

They hold this right in trust for the public convenience and benefit.

So also the authority given by the Legislature to the Corporation to erect wharves and piers (Act of April the 3d, 1798), is one given for the public benefit, and to be exercised by the Corporation as trustees for the public. Among other objects specified in the preamble of the Act of 1798, is this; that the erection of streets fronting the river, with bulkheads and piers, would conduce to the improvement and health of the city, and "to the safety of such ships or vessels as may be employed in the trade and commerce thereof."

The right, in both cases, is one having a great public accommodation and benefit in view.

Is the right to create a ferry of so much higher or greater

importance to the public than the authority to license the erection of a wharf or pier, that the latter must be held in subordination to the first?

If the Corporation, deeming it necessary for the convenience of commerce that a new slip should be constructed, or an old one enlarged, should pass an ordinance for the erection of the necessary piers by the owners of the adjoining or opposite property, and preferring to be at no expense themselves, do not elect to bear one-third of the cost, but permit the piers to be constructed at the sole cost of the private owners, can they, the day after the completion of the piers, make a grant to other individuals of the entire basin or slip, for the purposes of a ferry? Or if they can, can they do it without making just compensation?

The rights of a grantee of a ferry franchise constitute property, and cannot be taken for public use without just compensation. (Hoffman's Treatise, pp. 129-30, and note in Appendix.)

In what respect does the right or property in a pier differ in this respect?

It is said the Corporation have power to fill up a public slip, and thus take away all wharfage from the bulkheads or piers. This is undoubtedly true, but the cases are not analogous. The power to fill up a public slip is conferred upon the Corporation by express statute, for the preservation of the public health—Act of April the 2d, 1803, Davies' Laws, 413—and its execution necessarily carries with it a destruction of the wharfage.

The right claimed in the present instance in favor of the ferry franchise, is, solely, that it is one of paramount importance to the public, and, therefore, to override the right acquired by the construction of a pier,—the right to grant the franchise in the one case, or direct the erection of a pier in the other, being equally vested in the Corporation.

It is that which I dispute. Undoubtedly the right to grant ferry privileges should receive the largest and most liberal construction, but the defendants claim too much in this case. They claim that the grant of a ferry franchise in the same slip absolutely puts an end to all rights of wharfage in the owners of the enclosing or boundary piers, no matter at what expense they were erected, nor how long enjoyed, nor whether the Corporation have any interest in them or not.

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To have contended that the ferry right was so far paramount, as that it entitled the Corporation to deprive the owners of the piers, of their property in the wharfage, on making them a just compensation, might have presented a different and a more easily manageable question; but to contend, as is now done, that the one species of property must absolutely cease and disappear without compensation or equivalent, when the right to the other is granted, is at war with the first principles of justice, and not sanctioned by any proper construction, as we conceive, of the rights of the Corporation under their charter and the laws of the State.

It is said that if this judgment is sustained, the Wall street ferry can never be run. That may be true, but it is wholly unimportant whether it can or cannot be run, when the question is one affecting the legal rights of the parties. But, strictly, it is not true, because it yet remains to be seen whether Murray cannot be compelled to yield his rights on receiving compensation.

If by reason of the nature of the ownership in pier Number 16, the Corporation have no control over it, it is their fault. By electing to pay, and paying one-third of the expense of the extension, they would have secured absolutely the control of the southerly side, and half the exterior end of the pier, which would have answered all their purposes. This they appear to have done in respect to pier Number 15, on the opposite side of the slip; and hence they convey the inner side of that slip in express terms to Sharp.

The defendants' counsel treat the ownership or property of Murray as a mere private right, and the ferry franchise in Sharp as one for a public use. We think there is a confusion of terms in this; both rights are held by individuals, and enure to the private benefit of individuals; but both, and one not more or less than the other, are held for public objects, and tend to the great advantage, comfort, and prosperity of the city, its inhabitants, and commerce.

It is in our minds a question of very serious doubt, whether, in respect to the 22 feet 11 inches of the 98 feet of bulkhead in South Street, which is left on the south side of pier Number 16, the Corporation can lawfully make a grant of a ferry right in

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the ship, which shall interfere with the plaintiff's right of wharfage. Such right is secured by the covenant of the Corporation in the grant to Murray, the ancestor, in 1797.

In Furman's case (5 Sandf. Rep. 16), it was held that, by the extension of the water line of the city, the right of wharfage in the plaintiff was for ever gone, notwithstanding a similar covenant in a grant to him; but that decision was put on the express ground that Furman's lot extended only to Front street, which was within the 400 feet granted to the Corporation by the charter, and that both parties had contracted in reference to the future extension of the city to the outer limits of that space. In the present case, the 400 feet were exhausted before reaching the bulkhead on South street, and the pier stands wholly on land owned by the State.

In every view we are able to take of the case, the judgment at Special Term should be affirmed.

WILLIAM SHARP v. AUGUSTUS W. WHIPPLE.

An insurance broker has a lien for the premiums paid by him and his commissions upon the policies which he effects, even when it is known to him that the person who employs him is merely an agent for the party assured; and when it is not known to him that his employer is merely an agent, he has probably a similar lien as against such employer, for the general balance of his account.

But the lien of the broker, whether special or general, is extinguished, when he parts with the possession of the policies, by their delivery to the assured or his agent.

The lien, however, again attaches, or, in the language of the books, is revived, if the policies come again into his possession from the person against whom the right in its origin existed. It is not revived, if they come into his hands from a person not known to him as his employer, or the assured, when the insurance was effected.

If there is no lien when the insurance is effected, no subsequent transaction between the broker and the agent who employed him can create such a lien as against the owner assured.

An insurance "for whom it may concern" does not necessarily embrace all who may at the time have an insurable interest in the property insured, but the general words are restricted to those for whose benefit the insurance was in fact made, whose rights and interests were then meant to be protected.

Hence, when an insurance by general words is made for the exclusive benefit of one

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partner, or part-owner, he is entitled, in the event of a loss, to recover the whole sum insured, when it does not exceed the value of his interest. Hence, also, as the policy belongs to him exclusively, he is entitled to demand its possession from the broker who effected it, and, when necessary, to maintain an action in his own name against such broker for its wrongful conversion.

In order to maintain such an action, a demand and refusal are not necessary to be proved, when it appears that before the action was commenced the broker, in violation of his duty, had surrendered to the insurers, or otherwise parted with the possession of the policy.

A broker who has compromised with insurers liable for a total loss, for a less sum than the amount then recoverable, and has given up the policy, is answerable to the owner assured for the whole sum insured, and not merely for that which he received, when it does not appear that he had any authority, express or implied, to make the compromise.

So an insurance broker is also guilty of a wrongful conversion, who, having obtained a judgment upon a policy in his own name, uses the judgment for his own benefit, or deprives the assured, by any means, of the power of enforcing its collection.

Judgment for plaintiff, with costs.

(Before Dyer, Slosson, and Woodruff, J.J.)

Heard, April 7; decided, June 11, 1857.

CASE upon a general verdict for the plaintiff, subject to the opinion of the Court on the questions of law arising at the trial, and there ordered to be heard, in the first instance, at the General Term.

The following is a statement of the pleadings, and of the proceedings had, and facts proved upon the trial.

The complaint is of a somewhat equivocal character. In part it would appear to proceed upon a claim that the defendant had received money upon a policy of insurance belonging to the plaintiff, which he refuses to pay over, and in part it proceeds upon allegations that the defendant has converted a policy of insurance, belonging to the plaintiff, to his own use, appropriating it to the satisfaction of his own debts. It however states the plaintiff's claim and the defendant's refusal in terms sufficiently comprehensive to embrace the facts developed on the trial, and raise the general questions whether, and to what amount, the plaintiff is entitled to recover.

The defendant's answer denies the facts alleged by the plaintiff, and sets up a lien upon the policies of insurance, as insurance broker, for the payment of a balance of account due to him from the party by whose request he effected the insurance.

It appeared on the trial that, prior to April, 1853, the plaintiff

was the owner of $\frac{1}{4}$ ths of a vessel called the Jenny Lind, and was sole owner of another vessel called the Joseph Porter.

That the plaintiff had dealings with James De W. Spurr, in which the latter made advances to the plaintiff upon cargoes or freight, and as the agent of the plaintiff, but in order to protect Spurr for his advances, the latter employed the defendant, an insurance broker, to procure insurance.

Under that employment, the defendant, in April, 1853, effected an insurance for \$5,000, upon the vessel called the "Jenny Lind," by a valued policy, with the Merchants' Insurance Company, of Louisville; and for \$2,000 upon the freight of the "Joseph Porter," by a valued policy, with the General Mutual Insurance Company, of New York.

The Companies, by the terms of their policies, insured "A. W. Whipple, on account of whom it may concern (loss, if any, payable to J. De W. Spurr)."

The defendant, having effected the insurance, sent the policies to Mr. Spurr, in Liverpool, Eng., by whom they were retained until after the loss of the two vessels, when the policies were respectively returned to the defendant, by Mr. Spurr, for collection.

One of the policies, with various papers accompanying the same, was received for this purpose by the defendant on the 10th of January, 1854, and the other, with similar papers, was so received by the defendant February 20th, 1854. These accompanying papers showed that the plaintiff was the owner of the vessels, *i. e.* $\frac{1}{4}$ ths of the Jenny Lind, and the whole of the Joseph Porter. One of those papers states, in terms, that the insurance was effected at the plaintiff's request, by the defendant, through and in the name of Spurr, &c. Although the date of this statement appears in the printed case as of a later date, there is an admission that it was received by the defendant on the 20th of February, 1854, and we therefore conclude that the date has been erroneously printed.

It does not appear that, when the insurance was effected by the defendant, he was aware of the plaintiff's ownership; but the papers accompanying the policies, on their being returned to him, fully disclose it.

By letter of May 31st, 1854, received by the defendant June

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15th, 1854, the plaintiff further and distinctly notified the defendant that the ships were his, and that, although the policies are in the name of Mr. Spurr, the interest is altogether the plaintiff's.

Other letters show that the defendant did not give the plaintiff the information he desired, and even that he declined corresponding with him on the subject; and on the 16th November, 1854, the plaintiff caused a formal notice to be served on the defendant, apprising him that the insurances were effected for his account and benefit, and that he was solely interested, &c.

In April, 1855, the plaintiff procured from Mr. Spurr a formal order upon the defendant for these policies, requesting him to deliver them to the plaintiff, or to his agent, and the plaintiff drew an order requiring the defendant to deliver the policies to his agents, DeWolf, Starr, & Co., of New York. The order was given to the defendant in April or May, 1855, and Mr. Starr, of the firm of DeWolf, Starr, & Co., who had also a power of attorney from the plaintiff, saw the defendant on the subject, and he testifies thus: "I could get no information from him; he would make no explanations or admissions; I demanded the policies, and he refused to give them to me; he said that Spurr owed him, and that he held them for his indebtedness; he would not give me the account between himself and Spurr; he would give me none of the items and none of the particulars of that account." On cross-examination, the witness repeats his statement of his demand of these two policies, and the defendant's refusal. To this evidence there is no contradiction.

After the 15th of July, 1855 (but at what precise date the printed case before us does not show), this action was brought; and on the trial it further appeared, that on or about the first of June, 1855, and after the demand made of him, as above stated, the defendant surrendered the policy for \$5,000 upon the Jenny Lind to the agent of the Merchants' Insurance Company, and received therefor \$2,500; but that he, at the same time, took from the agent a writing in the words following, viz:

"The Merchants' Louisville Insurance Company, having this day paid to Mr. A. W. Whipple, a settlement by compromise, of fifty per cent. on policy No. 2,022, issued on the first day of March, 1853, on ship 'Jenny Lind,' for five thousand dollars, payable in case of loss to J. De W. Spurr, and by the said J. De

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W. Spurr assigned, on the tenth day of February, 1854, to the said A. W. Whipple, the said compromise this day paid amounting to the sum of twenty-five hundred dollars; now, in consideration of the said settlement by compromise, and of the possible contingency that it may be wished by the said A. W. Whipple at a future time to pay back to the said Company the said sum of twenty-five hundred dollars, and receive in lieu thereof the said policy No 2,022, The Merchants' Louisville Insurance Company hereby promises and agrees with the said A. W. Whipple, upon receiving from him the said sum of twenty-five hundred dollars, together with interest thereon from this day, to return to him the said policy uncanceled, and also uncanceled all papers pertaining to the loss under said policy that have been received by the said Company from him, the said A. W. Whipple.

Merchants' Louisville Insurance Company,
By WM. PRATHEY, Agent."

It further appeared, that on or about the 10th of August, 1854, the defendant had recovered a judgment upon the policy on the Joseph Porter, against the General Mutual Insurance Company for \$2,046.25. That said Company had afterwards been dissolved and a receiver of its property appointed. That a stipulation had been made by the attorney for the defendant, in the suit in which he had recovered judgment, by which it was agreed, that no process, execution, or other action should be had on such judgment, but that it should be adjusted with other claims by the receiver. That in 1856, the receiver brought an action against this defendant upon notes, held by him as such receiver, made by the defendant, and delivered by him to the Company, amounting to over \$4,000, and in such action the defendant by way of defence among other things, set up the judgment above mentioned, and claimed the right to have the same set off against the claim of the plaintiff therein.

The Judge at the trial having charged the jury, they rendered a general verdict for the plaintiff, for \$6,075.66 (being $\frac{2}{3}$ ths of the amount of the policy which the defendant had surrendered, with interest, from the 1st June, 1855, \$3,704.10 and the amount of the judgment recovered by the defendant against the General Mutual Insurance Company, (exclusive of costs) and the interest

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thereon \$2,371.56), which verdict was taken subject to the opinion of the Court at General Term, on the questions of law arising in the case.

The jury also found specially—

That the plaintiff owned $\frac{1}{4}$ th parts of the Jenny Lind, and that $\frac{1}{4}$ th parts of the \$2,500 received by the defendant on the 1st of June, 1855, on the compromise of the policy on that vessel, with interest, is \$1,852.5.

That $\frac{1}{4}$ th parts of the \$5,000 insured by that policy and interest thereon is \$3,704.10.

That the plaintiff was sole owner of the Joseph Porter, and the amount of the judgment recovered by the defendant on that policy against the Company issuing it, with interest, (excluding that part of the judgment consisting of costs) is \$2,371.56.

That said Spurr was indebted to the defendant on the 17th of November, 1854, in the sum of \$1,782.15 on account of the previous dealings between them, and that no part of that sum is paid.

The parties consented that the Court may modify the verdict as shall be just, and according to the rights of the parties, and with power to deduct from the amount the plaintiff would otherwise be entitled to recover, the said \$1,782.15, and interest thereon, if of opinion that the defendant is entitled to have such deduction made—and the Court thereupon ordered that the case be heard in the first instance at the General Term, and that the judgment be there first applied for, and that the entry of judgment in the mean time be suspended.

Edwards Pierrepont, for the plaintiff, cited, 1 East. 335; 2 Caines, 299; 5 Hill. 421; 6 Paige, 583; 3 John. Cases, 130.

Jno. Graham, for the defendant, cited 4 Comst. 497; Story on Agency, §§ 352, 363, 379, 389, 386, 390, 370; 3 Seld. 288; 2 Kern. 313; 1 Comst. 522; 10 John. 172.

BY THE COURT. WOODRUFF, J.—The charge of the Judge given to the jury on the trial, does not appear in the case submitted, and no exceptions were taken by the defendant to such charge. It must therefore be assumed that correct instructions

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were given to the jury, in respect to all questions of law which were material as a guide to their deliberations, and as to the legal effect of the facts which they might find to be established by the evidence.

The jury having rendered a general verdict for the plaintiff, must be deemed to have found in his favor under those instructions every material fact in issue, so that if there is upon the evidence, any matter of doubt or conflict, it must be deemed settled by the general verdict. The verdict being taken subject to the opinion of the Court on the questions of law only, we are not called upon to consider on this hearing any other questions, than such as were raised on the trial, and such as arise upon the special finding which so far as it is inconsistent with the general verdict, must control the latter. (Code, § 262.) The issues therefore made by these parties by their pleadings, must be taken to have been found under proper directions in favor of the plaintiff, except so far as the facts specially found should control that result.

The only questions of law appearing to have been formally raised and submitted to the Judge on the trial, were those suggested by the defendant's motion for a nonsuit, which being denied, he excepted to the ruling. No other exception appears in the case. And the questions of law, subject to which the verdict was taken, are those presented by the motion for a nonsuit, and those which arise upon the special findings of the jury which accompanied their verdict.

The grounds upon which a nonsuit was urged were, that at the time the insurances were effected the defendant had no notice that the plaintiff had any interest in the policies, and that the evidence showed that the defendant had a lien upon them for his general balance against Spurr, the person by whose employment the defendant as insurance broker effected the insurance.

The special finding of the jury establishes the interest of the plaintiff in the subject of the insurance. The insurance was in terms for account of whom it might concern, the agent Spurr being only interested in the policies as a protection to him for his advances.

The finding also determines that Spurr, on whose employment

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the defendant acted, was on the 17th of November, 1854, indebted to the defendant in the sum of \$1,782 15 on account of the previous dealings between them, and that no part of that sum is paid.

We do not, therefore, perceive that there is regularly before us any question of law, except the single one whether upon the evidence the nonsuit should have been ordered on the ground upon which it was moved by the defendant's counsel, and whether the amount of the debt due to him by Spurr should be deducted from the verdict.

These were the questions of law raised at the trial. Where a defendant moves for a nonsuit, and takes his ground at the trial, he ought not to be permitted on the review to assign other reasons, if they are in their nature such as, had they been then called to the attention of the plaintiff and the Court, might have been obviated by other or further proofs.

I repeat, that this question, whether the defendant had such a lien as defeats the plaintiff's claim to the policies in question, or if not, whether upon the special finding the sum due to him by Spurr should be deducted from the verdict, appear to be the only questions now regularly before us, for the reason above stated, and because also, there is obviously no inconsistency between the general verdict and the special findings, except so far as the latter exhibit a claim to such deduction from the general verdict.

Practically the question is single. Had the defendant at the time this action was brought a lien upon the policies as against the plaintiff? If not, then he clearly is not entitled either to defeat the action by insisting on a right to detain them, nor to deduct his account from the verdict.

It undoubtedly appeared that the defendant, as insurance broker, had dealings with Spurr, by whose direction he effected the insurance; and it did not affirmatively appear that when these insurances were effected he was apprised that the plaintiff was interested therein. Some of the testimony of the witness Spurr might indicate that the defendant knew that the plaintiff was the owner of the subject of the insurance. He says that he wrote to the defendant that the plaintiff was the owner, but his cross-examination leaves the matter in so great doubt, at least, whether

that communication was made at or before the insurance was effected, that we ought to assume that he had at that time no such knowledge.

It also appeared that the dealings between Spurr and the defendant were in the defendant's capacity of insurance broker, and related to insurance transactions.

It is entirely clear, as matter of law, that if the defendant paid the premiums on effecting these two insurances now in question, he had a lien upon the policies as security for his reimbursement and his commissions. And it is probably not less clear that he had also a lien for the general balance of his insurance account against Spurr, who, at that time, was the only principal known to him in the transaction.

This general doctrine, declared by Lord Hardwicke, in equity, in *Kruger v. Wilcox*, (Ambler 252) in 1755, and since then well settled at law, we do not understand to be controverted by the plaintiff's counsel. (*Man v. Shiffner*, 2 East. 523; *Mann v. Forrester*, 4 Camp. 60; *Westwood v. Bell*, ib. 352; Story on Agency, p. 854; and cases cited in notes. Cross on Lien, 277, and onward. 2 Kent Com. 634, &c.; 2 Duer on Ins. 280, &c., § 1, 2.)

It does not, however, appear in the case, that down to the time when these policies were sent to Liverpool, any sum whatever was due to the defendant from Spurr. The insurance was effected in or about April, 1853. Prior to December in that year, the defendant sent the policies to Spurr in Liverpool. The proof and the finding of the jury is, that in November, 1854, there was a balance due to the defendant, but when it arose does not appear. Spurr testifies that he and the defendant in their dealings kept their accounts as nearly square as possible. That the defendant was always authorized to draw for anything he might be called upon to pay on Spurr's account here. And also, that he thinks nothing was due to the defendant for the premiums on these policies.

So that it does not appear that when the defendant sent the policies to Spurr, he had any lien thereon.

But however that may have been, when the defendant parted with the possession of the policies, and they came into the hands of Spurr, they were not subject to any lien in favor of the

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defendant; if any had existed it was gone. (See the authorities above cited, and Story on Agency, § 367.)

After the loss occurred, the policies were returned to the defendant for collection. It may be conceded that the general rule is, that where an insurance broker, having a lien, parts with the possession of the policies and so loses his lien, his lien will, in the language of the books, be revived, if the policies come again to his possession.—Amb. 254; Cross, p. 280; and cases above and below cited; *Levy v. Barnard*, 8 Taunt. 149.

But in regard to this revival of the lien it is to be observed, that it is not, in strictness, a revival of a pre-existing lien. The doctrine is this: when the policies come again into the broker's possession, a lien attaches, as it would upon new policies coming into his hands. Not, therefore, because he once had a lien, which was temporarily suspended, but because, by the general rule, he has a lien upon the securities in his possession for advances made upon account thereof, or as the case may be, for his general balance. This distinction is important, because from it results this qualification—that his lien will not attach if, when they are so returned to him, circumstances have so occurred that no lien for his general balance would attach if they then for the first time came to his hands. In the language of Mr. Justice Story, in substance, his lien will not re-attach to the property, unless when it comes again into his possession, it comes as the property of the same owner against whom his right exists, and no new intermediate equities have affected it.—§ 470, and cases referred to.

If, therefore, the defendant received the policies for collection, and was then apprised that the present plaintiff was the owner, no lien in favor of the defendant would attach for a prior balance against Spurr, if any existed at that time, which, as before observed, does not appear. And it is equally, if not more clearly true, that he could acquire no lien, as against the plaintiff, for a general balance subsequently arising between him and Spurr. This principle will be found stated in the elementary works above referred to, and in Paley on Agency, 145, and note 15, p. 148; Law Library edition, pp. 63-4; *Houghton v. Matthews*, 3 Bos. and Pul. 485; *Mann v. Schiffner*, 2 East. 523; *Jarvis v. Rogers*, 15 Mass. 396; *Foster v. Hoyt*, 2 Johns. Ca. 327; 2 Duer on Ins. 282, § 3.

We are therefore of opinion that in this case no lien in favor of the defendant attached to these policies when they were returned to him for collection, not only because it was not shown that anything was then due to him, but also because that when so returned, the ownership of the plaintiff was disclosed. And for that reason, also, no subsequent transactions with Spurr, creating a balance, would create a lien on the policies to the prejudice of the plaintiff.

So, also, on the 15th June, 1854, by letter of May 31st, the defendant was distinctly notified by the plaintiff that he was owner, and that although the policies were in the name of Spurr, the interest is altogether in the plaintiff. It is not shown that at this time anything was due by Spurr to the defendant, and of course the above observations apply to this date, and to the notice then given.

The defendant, therefore, had no lien upon these policies for the balance of his account with Spurr on the 17th of November, 1854, and is therefore not entitled to have that balance deducted from the verdict.

As before observed, this seems to dispose of the only questions of law which appear by the case to have been raised on the trial, and the questions subject to which the verdict was taken.

The case was argued before us as if every question of fact and law which can now be raised upon the case, as made up for argument, might be considered; and notwithstanding we think that in strictness the case is to be disposed of, as above intimated, we have considered the other points and arguments, ingeniously and ably urged upon our attention.

At the time of the demand made upon the defendant, the plaintiff was entitled to the policies. The fact that he owned only $\frac{1}{4}$ ths of the Jenny Lind did not affect his title to the policy. The policy protected his interest. The case does not show that his co-owner was in any wise protected. The insurance was for account of whom it may concern, but those terms are always controlled by proof of the parties for whose benefit the insurance was in fact intended, and it in no wise appears that the co-owner was interested in the policy, or was in any wise intended to be protected by it. Indeed, we do not fully understand upon what

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principle it is that the recovery here was claimed by the complaint, and so on the trial taken to be limited to $\frac{4}{7}$ ths of the amount of the policy. If the interest of the plaintiff and his loss amounted to the whole sum insured, the reason for supposing that he could not have recovered the whole amount of the policy in his own name is not apparent. In *The Pacific Insurance Co. v. Catlett* (1 Wend. 561, and S. C. in Error, 4 Wend. 75), where an insurance was expressed to be "on account of the owners," the plaintiff, by whose orders and for whose benefit the insurance was effected, was held entitled to recover the full sum insured, although it appeared that, in truth, he only owned five-sixths of the vessel. (See S. C. 1 Paine's U. S. Dist. Ct. Rep.) At all events, the plaintiff had a clear right to demand possession of the policy. But as to this particular policy, there is a conclusive answer to the alleged defect in the demand. The defendant, before this suit was brought, had wrongfully surrendered the policy, and no demand was necessary. He had violated his duty as agent, or broker. He had done what the plaintiff had a right to regard as an actual conversion of the policy. And this meets another suggestion, viz. that the plaintiff was only entitled to recover the amount at which the defendant compromised with the Company. He had no authority, either express or implied, to make the compromise. The act was not only without authority, but was a tortious act, done in defiance of the plaintiff and with knowledge of his claims.

And as to the other policy, which appeared on the trial to have been sued upon and judgment recovered, it may be that if on the demand being made the defendant had disclosed the fact, the form of the present action would have required amendment. But we think that the evidence shows an actual conversion of this policy to the defendant's use. He sued it in his own name. He refused to give any account of it to the agent of the plaintiff—would give no explanations—concealed the fact that he had recovered a judgment—and finally treats that judgment as his own, and after a stipulation by his attorney not to enforce it, save by adjusting it with other claims by the receiver, sets it up as a set-off against such claims. Under such circumstances we think the demand sufficient, and the conversion proved. We could not, we think, hold that the

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plaintiff, under the circumstances stated, had not done all which he was bound to do to sustain the action.

It is true that the answer setting up this judgment as a set-off against claims upon the defendant personally, was put in after this action was commenced, but it was read without objection, and it showed how fully the defendant was exercising acts of ownership over the claim, in defiance of the plaintiff, and gives character to the acts, concealments, and refusals of the defendant, which were prior to the bringing of this action.

To this suggestion may be further added, on the subject of the defendant's claim to a lien, and that its amount should have been tendered—that his refusal to furnish any account, or give any information, may well be taken to have rendered a tender impossible, and so to have waived any tender.

And we have no doubt that the amount of the policies being upon the evidence *prima facie* due, that amount is, in the absence of countervailing testimony, to be taken as the measure of damages. They had become, in substance, securities for the payment of a definite sum of money, and were presumptively of that value. The defendant had no right, by unauthorized compromise, or by setting off against what he himself owed, to deprive the plaintiff of his whole opportunity to collect them.

Our conclusion is, that judgment should be ordered for the plaintiff upon the verdict.

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When some of the defendants demur to the complaint, and the demurrer is overruled, "with liberty to answer in twenty days, on payment of costs," and such decision, on an appeal to the General Term, is affirmed, such defendants must tender an answer within twenty days after such affirmance, although the costs of the demurrer have not been taxed, or the right to answer is gone. A decision, subsequently made on the trial of the action, denying a motion then made for leave to answer, is not the subject of an exception which can be reviewed on an appeal from the judgment.

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On a trial of the issues of fact between the plaintiff and the other defendants, the plaintiff may, and should, also apply for the relief to which he is entitled, as against the defendants so demurring.

A decision at the trial, denying a motion for leave to amend an answer, served some two years prior thereto, is, in the most favorable view that can be taken for a defendant, a decision within the discretion of the Court, and is not the subject of an exception.

Although a defendant may be entitled, equitably, to an allowance, on the trial, for services rendered and materials furnished to the plaintiff after suit brought, yet, if on the trial an inquiry into them, subsequent to suit brought, is excluded by the Court on the defendant's motion and objection, such defendant cannot object, on appeal from the judgment, that he was not allowed for such matters furnished subsequent to suit brought.

A defendant who has demurred to the complaint, and whose demurrer has been overruled, cannot, on an assessment of damages, be permitted to prove matters in their nature giving a right to reduce the amount of the plaintiff's claim, and as such constituting a partial defence. To give a right to prove, and be allowed the benefit of them, they must be set up by answer, as a defence.

When a plaintiff, under a contract between him and one of several defendants, and under subsequent contracts between such defendant and his co-defendants, in relation to the same matter, claims, in good faith, a right to be boarded without charge, as due to him upon a just construction of such contracts, and such board has been furnished under such claim, and as of right due to the plaintiff, the defendants so furnishing it cannot recover of the plaintiff for its value, though the Court may think the plaintiff's construction of the contracts erroneous.

When an owner of property, at the time encumbered, assigns it to another on his agreement to pay the encumbrance and sell the property, and, after satisfying his advances and disbursements in that behalf, to pay to the assignor one-half of any surplus left, and of any profits made by the use of the property in the meantime, and finally, the two agree upon the sum to be paid to the original owner, in satisfaction of his interest and claims, and such assignee then sells and transfers such property, subject to such original owner's claims thereon and interest thereon, and such second purchaser agrees to pay the sum so adjusted and agreed upon, and he subsequently transfers the property to a third purchaser, who does not agree to pay it, but subject expressly to such claim, and the third purchaser sells it to a fourth, subject to such claim, and who also agrees to pay to the original owner the said sum so agreed upon; an action may be maintained by the original owner against all of said defendants, to have the property sold and the proceeds applied to pay the sum so agreed upon, and in default of the said amount being realized from the property, to collect from the said first and second purchaser, in the order of their liabilities, the amount of the deficiency.

In such an action the original owner may have judgment against the first and second purchaser severally for the amount so agreed upon, upon their promise to pay it. But he can have no such judgment against the third purchaser, as he did not personally promise to pay, nor against the fourth purchaser, as his promisee was under no personal liability to pay.

On such a state of facts, the claim to have the sum so agreed upon declared a lien upon the property, and ordered to be paid out of it by a sale of the property, and such an application of its proceeds, is a single cause of action. The several

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Liabilities of such purchasers are collateral matters, and may be enforced to make good any deficiency resulting from a sale of the property.

An assignment by a plaintiff, *pendente lite*, of his interest in the subject of the action, does not abate it. It is discretionary with the Court to substitute the assignee as plaintiff, or allow the action to proceed in the name of the original plaintiff: when a motion to so substitute has been made and denied, and the time to appeal is allowed to expire, the fact of such a transfer cannot be made available at the trial, to defeat a recovery, nor does it present a question which can be considered, on an appeal from the judgment.

Nor will the judgment that may be rendered at the trial be different, in its substantial terms, from the judgment that would have been rendered, had no such transfer been made.

(Before BOSWORTH and WOODRUFF, J.J.)

Submitted, June 5; decided, October 17, 1857.

THIS action comes before the Court, on an appeal by the defendants from the whole judgment, and by the plaintiff, from a part of the judgment. It was tried before Mr. Justice HOFFMAN without a jury, in February, 1856. The judgment appealed from, was entered in December, 1856. The action was commenced about the 11th of April, 1854, by Samuel Ford, plaintiff, against Henry J. David, & Don. M. M. Turner, as defendants.

The original complaint alleged that, on and before the 24th of October, 1853, the plaintiff was proprietor of the Mercantile Hotel, consisting of Nos. 2, 4, 6, and 8 Warren street, in New York city, and of unexpired leases thereof, and of all the furniture and fixtures therein; that the leases and all the furniture and fixtures, except some \$3,000 worth of furniture, had been mortgaged to David S. Jones. A schedule of the property so mortgaged was annexed to the mortgage. Jones had assigned the mortgage to P. T. Barnum, \$14,000 was due on it. Barnum desired payment. Plaintiff could not pay without assistance. David knew this, represented himself to be wealthy, and proposed to assist plaintiff, and on the 24th of October, 1853, David and plaintiff by a written and sealed agreement, agreed as follows:

The agreement, after reciting plaintiff's ownership of the leases and furniture, the existence of the mortgage, and that David, at Ford's request, had joined him, in executing to Barnum two notes of \$7,000 each, of that date, payable, one in 10 days, and the other in 43 days, which are secured by a mortgage on such furniture and leases, provides and declares that Ford "hereby conveys" to David, the Hotel, leases, and all furniture

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set forth in the schedule annexed to said mortgage, also the fixtures; David's possession to date from the 21st of said October. He agreed to pay the said notes, and the rent of that quarter, to be due on the 1st of November then next, and was to have the rent from the undertenants, and Ford agreed "to loan" for 45 days, to David \$2,000 on or before the 1st of November, towards paying said rent.

It further provided as follows:

"It is also agreed by and between the parties aforesaid, that as long as said David carries on the said Hotel business, he is to retain said Ford, with his family, to manage and conduct it, under said David's direction and control; and the said Ford for himself agrees so to manage and conduct it, faithfully, and to the best of his ability.

"And this agreement also witnesseth, that the said David, his executors, administrators, or assigns, is to make such advantageous sale of the said Hotel, and of said buildings, and of said leases, and of said furniture, and of said fixtures, as may appear advisable, and receive the proceeds thereof, and out of the proceeds thereof, and the profits of carrying on the said business, to pay the aforesaid notes and all charges and expenses, and all payments paid, or made, liabilities incurred by said David, his executors, administrators, or assigns, so as fully to indemnify and pay said David in full for all principal and interest, and then in case said Ford shall have faithfully performed his part of this agreement to pay unto said Ford one half of the remainder of said profits of said business, and of the proceeds of the disposition of said premises; but after said David shall have been fully reimbursed, said Ford, if he choose, is to collect and receive the one half of said proceeds, directly from the purchaser or purchasers.

"And it is further covenanted and agreed by and between the parties hereto, that on payment by said David, of said notes, he does and shall become substituted in the place of said Barnum, as mortgagee under the mortgage given to said Barnum to secure said notes, holding the same only as security for him under this agreement."

The complaint also states that, when this agreement was made, the plaintiff was in possession, and since has been, and managed the Hotel faithfully, though conducted in David's name, until

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David assumed the control, which he soon did do. It insists the conveyance of the 24th of October, 1853, is a trust conveyance, that plaintiff is equitable owner of the property, subject to David's claim under it. It states that David paid the two notes of \$7,000 each, and plaintiff on the 1st of November, 1853, lent him the \$2,000, no part of which has been paid. That on the 8d of November, 1853, Ford and David entered into another written and sealed agreement, and sets forth a copy of it. That agreement, after reciting the agreement of the 24th of October, 1853, proceeds thus: "and whereas said David agrees to retain said Ford to manage and conduct said Hotel, under said David's control and direction; and in consideration of which services, and the other covenants in the above named agreement, said David agreed to give to said Ford, the one half of the profits of said Hotel, and the proceeds of sale of said Hotel, after said David has indemnified himself out of such proceeds, all the money paid to P. T. Barnum, and any other moneys expended in said Hotel, or any liabilities incurred by said David for said Hotel."

"Now, it is hereby understood and agreed upon, that if said David at any time during the term of said leases elect to sell said Hotel and lease, furniture and fixtures of said Hotel for any price that he may be offered for the same, that the said David will give said Ford notice of said intention of at least ten days prior to such sale, and specify such price, and said Ford shall have the right during, or at the expiration of ten days, to purchase, or procure a purchaser for the same price, and on the same terms as offered by others to said David."

The complaint then states that another written and sealed agreement was entered into between Ford & David on the 10th of December, 1853, and sets forth a copy of it. It recites the two previous agreements and then proceeds as follows:

"Now this agreement witnesseth, that for and in consideration of the premises and the sum of one dollar respectively paid by each to the other, the said parties have hereto for themselves, respectively and their respective executors, administrators and assigns do covenant, promise and agree, that said Ford, for and in consideration of moneys when paid, and benefits hereafter to be received, expressed and set forth, will assign and transfer to

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the said David all and every interest the said Ford, has in and unto the said Hotel, as set forth in said agreement, made and entered into, by and between said parties on the 24th day of October last, and also on the 3rd day of November last, and give said David a receipt in full of all other claims and demands he, the said Ford may now have against the said David, and will quietly and peaceably (within two weeks after this date) move out of said Hotel himself and family, reserving the right to take away and remove all of his, said Ford's personal effects and household furniture in said Hotel, not included in a schedule or invoice attached to a mortgage or invoice given to David S. Jones, as above referred to in the aforesaid agreement, dated the 24th day of October last.

"Now the said David, for himself, his executors, administrators, and assigns, does promise, covenant and agree, for the above consideration, to pay to the said Ford, on or before the expiration of three weeks from the date of this contract, the sum of three thousand and one hundred dollars, in current money of the City of New York, and board the said Ford and his family for two weeks, free of expense to said Ford, and for such longer time as the aforesaid three thousand and one hundred dollars shall remain unpaid, not to exceed three weeks from this date, at which time, if not before, it shall be paid by said David or his assigns, to make this contract or agreement binding or valid as against said Ford.

"In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals the day and year above written."

The complaint then states that, on the 26th of January, 1854, *David & Turner* entered into a written agreement, by which David sold and Turner bought the leases, fixtures, and furniture mentioned in the schedule, annexed to the mortgage, but subject to the agreement of the 24th of October, 1853, and Turner agreed to pay, therefore, \$10,900, and covenanted to pay the plaintiff on demand \$3,100, and hold David harmless from all claims of the plaintiff, the agreement to be left in escrow with H. A. Mott, Esq., and not be delivered to Turner until he paid to plaintiff or satisfactorily arranged with him for the \$3,100. That Turner had at the time full knowledge of all the agree-

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ments. He entered at once into the hotel, and is still carrying it on. He has not paid any part of the \$3,100. Plaintiff has not given up possession, nor relinquished any of his rights, to him or to David.

Turner boarded plaintiff and his family until the 3d of April, 1854, when he refused to do so any longer, unless paid for it, or allowed for it on the \$3,100. He threatens to sell the hotel, leases, and furniture; and David has notified him not to pay the \$3,100 to plaintiff. It alleges that David & Turner are colluding together to defraud and deprive him of his rights. That Turner is using a large part of the furniture not in the schedule, annexed to the mortgage. It prays judgment that David & Turner pay the \$3,100, and interest, and that until it is paid, they be enjoined from selling or encumbering the leases, furniture, or fixtures, and that Turner be enjoined from removing the plaintiff or his family. That a receiver of the property be appointed to sell the property, and out of the proceeds pay to the plaintiff the \$3,100, and interest, and for other relief.

David put in a separate answer, sworn to on the 25th of May, 1854. It controverts the allegation that the plaintiff had furniture in the hotel, other than that mentioned in the schedule, annexed to the chattel mortgage.

It admits the agreement with the plaintiff "as stated in said complaint," but denies making any representations, or that it was entered into under the circumstances alleged.

It denies, that thereafter the plaintiff continued jointly with David in possession, but avers that David took possession, and retained plaintiff and his family under the agreement, to manage, &c.; but avers that the plaintiff was so unfaithful, and careless, that David was compelled to, and did take entire control, and continued it, until he made the disposition of the hotel, &c., stated in the complaint; and charges that the plaintiff and his family remained contrary to the agreement, and to David's express wish; and "this defendant claims damages therefor, by way of counter claim."

It denies that the agreement of the 24th of October, 1853, was a trust conveyance, or that the plaintiff is equitable owner, and claims that David became, thereby, seized, and possessed as absolute owner.

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It admits that David carried on the hotel up to the time stated, but denies that the plaintiff conducted the hotel faithfully for any portion of time, and alleges that he was negligent and unfaithful, whereby he broke the agreement on his part, and forfeited all right to be retained with his family to manage and conduct, &c. It admits the making of the two subsequent agreements, and the agreement with Turner as stated in the complaint, and avers that the sale to Turner was subject to the payment of the \$3,100, and that this sum was reserved out of the consideration money for that purpose.

Admits notifying Turner not to pay the \$3,100, and says he did so, because larger sums were due for taxes and back rent, when the first agreement was made, which the plaintiff agreed to pay, but did not, and David was compelled to pay them, and that he has a right to retain it out of the \$3,100, and also his reasonable charges for boarding plaintiff and his family, until the hotel was sold to Turner, and claims to recover \$4,000, by way of counter-claim. Denies all conspiracy or collusion with Turner, and prays a dismissal of the complaint with a judgment for his counter-claim.

The plaintiff by a reply (verified the 7th of October, 1854) denied promising to pay taxes or back rent, but avers that David agreed to pay them, and avers that the board of plaintiff and his family, payment for which is sought to be enforced as a counter-claim, was furnished under the agreement of the 24th of October, 1853, and that the plaintiff is not indebted to David in any sum.

The defendant Turner, by a separate answer, sworn to on the 24th of May, 1854, admits plaintiff's ownership of the hotel, and all furniture and fixtures therein on the 24th of October, 1853; the mortgage held by Barnum; that he required payment, and plaintiff was unable to pay, but denies that plaintiff had furniture, not covered by the schedule, annexed to the mortgage, of more than the value of \$150.

It alleges that, when the agreement of the 24th of October, 1853, was made, the plaintiff was insolvent, and that the said agreement was, in fact, and was intended to be an absolute sale, and that David paid the notes to Barnum, and thereupon, David's title became absolute, and the "plaintiff only was entitled to the said articles in actual use as aforesaid."

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It denies that plaintiff occupied jointly with David, and avers that after Turner took possession, the plaintiff and his family remained as boarders or tenants at license. It denies that the agreement of the 24th of October is a trust conveyance, or that plaintiff is the equitable owner. Denies that plaintiff loaned David the sum of \$2,000.

It avers that the agreement of the 10th of December was a proposition by the plaintiff to release David from all claim for the alleged loan of \$2,000, and for all claim for profits for \$3,100 and three weeks' board, but says it never took effect, and that it lapsed by non-performance within the three weeks.

It avers that *Turner*, by two agreements with David, one dated January 26, the other January 28, 1854, and recorded in the office of Register of the City and County of New York, bought the leases, furniture, and fixtures, "except the personal effects as aforesaid in the use of said plaintiff and his family," and entered into full and absolute possession thereof. David did not pay, but Turner did pay, the rents which David had agreed to pay. The stipulation to pay to Ford the \$3,100 was a personal contract with David, in which the plaintiff had no interest, and which he did not accept; and the notice from David not to pay it to Ford put an end to any claim of the plaintiff against Turner therefor.

It denies that Turner ever knew of the plaintiff's having any interest in the hotel, except as before recited, or that he owned any furniture not included in the mortgage schedule, "except the articles aforesaid in the actual use of the plaintiff's family."

It admits Turner went into possession when he bought and continued the business as proprietor, until the 10th of February, 1854, when he sold to T. W. Wheeler, since when he has had no interest in, nor been connected with it.

Denies that plaintiff had not given up possession when Turner bought, and avers that before that he gave full possession to David.

Admits that he refuses to pay plaintiff the \$3,100 on the grounds before stated, and because David has forbidden it and "is largely indebted to him."

It admits that the plaintiff has not sold or assigned any interest in the hotel to Turner, says he had none to sell, and

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was about being ejected, when he agreed to quit peaceably, as soon as he could get another boarding-place for his family.

Denies that, after Turner bought, the plaintiff had any interest in the leases, furniture, or fixtures, or any right to be boarded, or claimed to have, or that Turner has recognised the existence of any such right, or that Turner boarded them without claiming payment therefor; but insists, that as soon as he took possession he notified the plaintiff he must pay full board, viz., \$75 per week, which sum he owes Turner, and it "amounts to several hundred dollars." It says he refused to board him, unless he paid at once, and that Turner never requested to have it allowed on the \$3,100; denies plaintiff's right to stay in the hotel, and admits that he threatened to remove him for not paying, and denies he is doing anything to defraud plaintiff out of the \$3,100; does not know as plaintiff applied to David for the \$3,100, nor what answer David made.

It denies all conspiracy and fraud, or that Turner is using any furniture of the plaintiff's.

It then alleges a sale to Thomas W. Wheeler, on the 10th of February, 1854, and that since then he has carried on the hotel as Wheeler's tenant, and, in "subservience to his proprietorship of the same, and since said 10th of February this defendant has had no interest in said hotel, other than to carry the same on, as the keeper thereof." It then denies "each and every allegation in said complaint, necessary and material to be answered unto, and not hereinbefore and hereby specially answered unto, confessed or avoided, admitted or denied."

On the 4th of October, 1854, Mr. JUSTICE CAMPBELL, on affidavits and notice of motion, made an order that plaintiff have leave to reply to David's answer within four days, and "to file and serve a supplemental complaint in the cause, making Samuel P. Townsend and John Johnson parties defendants, alleging that they have become assignees of the interest of the defendant, Turner, since the commencement of this suit," upon the terms stated in such order.

On the 7th of October, 1854, a supplemental complaint was served, in which David, and Turner, and said Townsend, and Johnson are named as defendants. It alleges that this action was commenced on the 11th of April, 1854, that the summons

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and a copy of the original complaint were served on Turner on that day, and on David on the 14th of that month.

That on that day Turner was, by order of the Court, enjoined according to the prayer of the original complaint, and such order was served on him on that day, and is still in force, and on the 15th of said April, notice of the pendency and object of this action was duly filed. That David served an answer on the 24th of May, and Turner on the 26th of May, 1854.

That, at the time this suit was commenced, Turner occupied such parts of the hotel as were not used and possessed by the plaintiff and his family, subject to the right and possession of the plaintiff, as claimed in the complaint.

That on the 14th of April, 1854, Turner quitted the hotel and gave up possession to one Smith, who had previously been assisting Turner, and Smith remained until August, 1854, when he left.

When this suit was commenced, plaintiff was ignorant of the transfer by Turner to Wheeler; the same had not then been, nor since has been recorded.

It then alleges, that on the 9th of May, 1854, Wheeler, "by his attorney duly authorized," transferred the hotel, fixtures, and mortgaged furniture, to Samuel P. Townsend, "subject to plaintiff's lien and claim therein for the aforesaid sum of \$3,100, which the said Townsend assumed and agreed to pay off and discharge, as a part of the purchase-money of said property."

That, before the sale to Townsend, he and Wheeler's said attorney knew of the agreement between the plaintiff and David, and of the plaintiff's claim and right to remain in possession until he was paid the \$3,100, and that the plaintiff was in possession, claiming a right to so occupy. Both of them knew of the pendency of this action, and at the completion of such sale, Wheeler's said attorney deducted \$3,100 from the contract price, on account of plaintiff's said claim, to be paid by Townsend as aforesaid.

Early in August, 1854, after Townsend so purchased, he made some transfer to said Johnson, the particulars of which are not known to the plaintiff, by which said Johnson claims some interest, jointly with Townsend, in the hotel leases, fixtures, and all the furniture except that owned by the plaintiff, and at the time

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of such transfer Johnson knew of the pendency of this action, and of said injunction, or of some injunction, in force, "for the protection of plaintiff's aforesaid claim," and of plaintiff's possession, and his lien thereon to secure the \$3,100, and of his claim and right to occupy until it was paid, and of the furniture owned by the plaintiff and not owned by the chattel mortgage.

That under such, or some other agreement, Townsend and Johnson took possession, in August, 1854, of said property, and of some articles belonging to the plaintiff, and are still in possession, except of the rooms occupied by the plaintiff and his family, and conduct the hotel for their joint profit.

That plaintiff has demanded the \$3,100 of each of them, and each has refused to pay it. It then prays the full benefit of this action against them, and the same relief as prayed against David and Turner.

It also demands judgment as prayed in the original complaint, and also that Townsend and Johnson be ordered to pay the \$3,100, and to deliver to him the furniture that belongs to him, and that they may be enjoined from selling or encumbering it, or disturbing the plaintiff's enjoyment of the apartments occupied by himself and family; that they may be ordered to assign and transfer the leases, &c., to a receiver to be sold to pay the \$3,100 and interest, and for further relief.

Townsend and Johnson demurred "to the complaints herein taken together," and Turner also demurred to the "supplemental complaint," on grounds which they severally stated in such demurrers.

On the 30th of March, 1855, Mr. Justice DUER, after argument, overruled the demurrers, "with liberty to answer said complaint in twenty days, upon payment of costs," and such order, on an appeal therefrom, was affirmed, November, 1855, at a General Term held before DUER, BOSWORTH, and SLOSSON, J.J.

No answers were interposed, pursuant to the liberty so given. And on the 28th of February, 1856, the action was brought to trial before Judge HOFFMAN, as, before stated, on the issues raised by the answers of David and Turner, and to obtain the relief to which the plaintiff was entitled as against Townsend and Johnson.

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When the cause was called and the trial commenced, David and Turner, by Mr. *S. Sanxay*, their counsel, "moved that the trial take place by a jury." This was denied, and they excepted.

David and Turner then moved that the trial proceed on the original complaint, their answers thereto, and the reply to David's answer, and that the supplemental complaint, so far as they were concerned, be regarded as out of the case. The Justice decided that he would hear the case on the issues of fact on the part of David and Turner, and give such judgment against Townsend and Johnson as the plaintiff was entitled to, on the facts stated in the supplemental complaint. Each defendant excepted to this decision. The counsel of all the defendants then moved that "the supplemental complaint be made to conform to the order allowing the same, and all other statements to be considered extraneous." The Judge denied the motion, and "decided that the case must be tried on the pleadings, as they were on the record."

Townsend and Johnson then moved, that inasmuch as their demurrers had been overruled, that no proceedings be had against them until judgment was entered on said demurrers. But the Judge decided that "the present is the proper time to proceed against all the defendants; that the defendants Townsend and Johnson, by omitting to answer, stand in the light of defendants who have allowed a bill *pro confesso*, and that the Court must now decide upon the equities of the case.

"To all which the said counsel excepted.

"The counsel for the defendants David and Turner then moved that the complaint be dismissed, on the ground that the same does not show any jurisdiction in this Court, and on the ground that it does not contain facts sufficient to constitute a cause of action against the defendants jointly, nor against David and Turner, with Townsend and Johnson jointly, nor any two of them, nor against any of them severally.

"Which motion being denied, said counsel excepted.

"A like motion was then made on behalf of all the defendants severally.

"But such motion being denied, said counsel of the several defendants excepted.

"The counsel for defendants Townsend and Johnson then

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tendered an answer, then sworn to by defendant Townsend, and an affidavit, sworn to by defendant Johnson."

"The Court reserved any decision in respect to said answers for the present.

"The cause then proceeded to trial upon the issues raised by the defendants David and Turner in their answers.

"The counsel for plaintiff then read in evidence the agreement set forth in the complaint dated October 24th, 1853; also the agreement set out in the complaint dated November 3d, 1853; also the agreement set out in the complaint dated December 10th, 1853; then an agreement set out in the complaint dated January 26th, 1854, between David and Turner."

The latter agreement was recorded on the 20th of February, 1854, and by it, David's transfer to Turner was in terms "subject to all the terms, conditions and covenants in said three leases set forth, and also subject to all the covenants, conditions and terms contained in the assignment of said three leases to party hereto of the first part by one Samuel Ford, bearing date the 24th day of October, 1853."

It also contained the following clause, viz.—

"And the said party of the second part also agrees that he will pay to one Samuel Ford, on demand, the further sum of \$8,100, and take from said Ford a receipt therefor for the account of party hereto of the first part, and deliver the same within twenty-four hours after payment thereof to the party of the first part, and to hold said party of the first part harmless from all claims on the part of said Samuel Ford, arising out of said leases or contracts made between said Ford and party of the first part in regard to the aforesaid premises."

It also declared that said conveyance was "not to be delivered to said Turner until thirty-one hundred dollars are paid as aforesaid, to said Ford, or arranged satisfactorily with him."

An instrument of assignment, by which David assigned the leases to Turner, dated the 28th of January, 1854, was also put in evidence, and by the terms of such assignment it was made, "also subject to all the covenants, conditions and terms contained in the assignment of said three leases, to me, the said Henry J. David, by one Samuel Ford, bearing date the twenty-fourth day of October, one thousand eight hundred and fifty

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three, and also subject to the terms of a certain agreement made between the said Turner and myself, dated the twenty-sixth day of January, one thousand eight hundred and fifty-four, and the covenants, conditions, and provisions therein also mentioned."

There was also put in evidence an assignment by Ford, the plaintiff, to Jehiel Parmly, dated the 16th of September, 1854, of the claim in question, in trust, to pay certain creditors of Ford, therein named.

Also an assignment from said Ford to David D. Winchester, dated the 17th of October, 1854, of any surplus interest, in said claim, in trust to pay other creditors named in the last mentioned assignment.

Also a copy of the *lis-pendens* filed on the 15th of April, 1854.

The defendant's counsel put in evidence an order of the Court of Common Pleas, made on the 21st of May, 1855, on proceedings supplementary to execution, in an action in which Oliver Clarke was plaintiff, and said Samuel Ford was defendant, appointing Peter Valentine a receiver of such defendant's property, upon his executing and filing such a bond for the faithful performance of his duties, as the order prescribed.

The said counsel then moved to dismiss the complaint on the ground that it appears that plaintiff has no interest in the action.

Motion denied on the ground that an order which was before the Court had been entered, denying the application for the substitution of another plaintiff, as follows:

The order recites a motion by plaintiff that Ford's assignee be substituted as plaintiff, that the defendants opposed the motion, and then denied it.

The plaintiff called a witness, and was proceeding to examine him as to the value of board for the plaintiff and his family, insisting that he had a claim for its value during the time it was refused to him, and defendant's counsel "objected to any proof subsequent to April 11, 1854, when suit was brought."

The Court sustained the objection, and held that the proof must be limited to that date, without prejudice to the question of board since the commencement of this action.

When the plaintiff rested, (as the printed case states)

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"Motions on the part of defendants, to dismiss the complaint were renewed.

Same denied. Exception.

The said counsel then moved to dismiss the complaint, on the ground that it appears that the plaintiff has no interest in the action.

Motion denied, on the ground that an order which was before the court had been entered, denying the application for a substitution of another plaintiff. Exception.

The counsel for Townsend & Johnson moved that the complaint be dismissed as to them, inasmuch as the plaintiff had not, at the time of the filing of the supplemental complaint, any interest in the action.

Motion denied. Exception.

Counsel for defendants move that the assignees, Parmly & Winchester, one or both of them, be brought in as parties.

Motion denied. Exception.

Counsel for defendants renew their several motions aforesaid, severally.

And the same being again severally denied, said counsel except.

The counsel for defendants, David and Turner, then commenced to open their case, when the said Justice desired the said counsel to state what was expected to be proved, in writing.

Whereupon the said counsel made the following offers of proof of certain facts, and moved the Court that the answers of said defendants might be amended so as to admit of such proof, if the same did not already permit it; or that such answers be made to conform thereto, when such proof should be brought in.

Which said offers are as follows, to wit. Defendant David offers to prove,

1st. That he was induced to enter into the agreement with plaintiff, of the 24th of October, by the falsehood and fraud of the plaintiff, and his misrepresentations and deceit, in respect to the Hotel, and its costs, business, profitableness, and value. That in truth, the Hotel, leases, &c., cost Ford but \$10,000, though he represented that the same cost him a much larger sum. That in truth he procured but \$12,000 from Barnum, though the mort-

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gage was \$14,000, and that of the \$12,000 he paid but \$10,000 to Jones, and reserved \$2,000 for himself. And in truth the property never was worth more than \$10,000.

2nd. That the agreement of Nov. 8 was entered into upon the representation by plaintiff that he then had in view a purchaser of the hotel, &c., at a price of \$20,000 and upwards, which was false, and that, at all events, ten days notice of the sale to Turner was given to him.

3rd. That the agreement of 10th December was meant by the plaintiff to be a mere offer to quit the hotel, and give a full acquittance to David within three weeks, for \$3,100, and that if David did not accept the offer in that time, it was to fall through, and be at an end, and they were both to stand as if that agreement had not been made. That David understood the agreement in that sense, and that plaintiff knew that he so received the agreement in that sense, and meant that he should so receive it, and that it was in view of their securing the \$20,000 purchaser, and to re-let it to him within that time.

4th. That the hotel made no profits but was a loss to David of about one hundred dollars per day for all the time that he kept it, and until he sold it to Turner; and that the sale to Turner was at a loss upon David's investment; and that David never was indemnified for his advances and expenses in reference to the hotel, but he lost at least \$5,000.

5th. That the property mentioned in the schedule to the Barnum mortgage, was not all delivered with the hotel to David, but that there was a large deficiency, which was only subsequently to the sale to Turner discovered.

6th. That the assumption of payment by Turner of \$3,100 to Ford was upon the express condition that Ford was to release David, and look to Turner, and that he should at once quit the hotel, and extinguish all claim he had against it and against David.

7th. That at the time of the sale to David, or to Turner, Ford had no personal effects in the hotel, except a few articles, not exceeding one hundred and fifty dollars in value, but that he subsequently carried away ten cart loads of furniture, which exceeded in value three thousand dollars.

8th. That Ford at the time of sale to David was largely

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indebted to various persons as judgment creditors; that he has since said sale made an assignment of all his interests under the agreements above named, to one Jehiel Parmly, and created a resulting trust in himself, to the exclusion of his judgment creditors, and that since said assignment, which is void as against creditors, all the interest of Ford in the hotel, leases, and furniture has been sold by the Sheriff.

9th. That Turner undertook to pay the plaintiff \$3,100 upon the express understanding that he should at once quit the hotel with his family, and that he refused to do so, but continued to remain there and occupy rooms to the detriment and damage of Turner of about sixty dollars per week or more, and that he became indebted for that sum, and still owes the same.

10th. That on or about the 28th day of October, 1854, an injunction upon an order supplementary to execution was issued out of the Common Pleas Court against Ford; and that subsequently on or about the 21st day of May, 1855, a general receiver of all his property, rights and interests was appointed by said court.

11th. That taxes were unpaid which accrued while Ford was in possession of the hotel, which he was bound to pay, under and for which taxes a large part of the furniture of said hotel had been sold by public authority, and which defendants had to pay \$1,100 to redeem.

Defendant, Turner, offers to prove all the foregoing, and also,

1st. That when he bought the hotel, Ford misrepresented it in its value and profitableness; that he stated that he had no claim upon it, and no furniture in it, except about \$50 worth.

2nd. That his agreement that he was to pay him \$3,100 was upon the express understanding that said Ford and his family were at once to remove from the hotel, and take away his personal effects; or that if he remained he was to pay full board, and that he did remain a long time and became indebted for more than \$3,100.

3d. That David did not deliver the whole amount of furniture agreed to be sold, but that there was a large deficiency which was, subsequently to the agreement of the 28th of January, discovered, whereby he was entitled to an abatement from the purchase price to a sum exceeding \$3,100.

4th. That the transfer of the Leases was subject to back rents falling due 1st February, 1854, which by agreement of sale to Tur-

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ner, David was to discharge; that he did not discharge the same, but Turner had to pay the same, as the landlord took proceedings under Landlord and Tenants Act, to remove him from the premises; that the rent was \$13,000 and upwards per annum, and the sum thus paid, was one fourth of the same, which he has the right to offset against the claim of \$3,100 and claims the residue as against David.

5th. That his promise to David to pay Ford \$3,100 as part of the consideration, was for David's benefit, and the consideration failed wholly, or at all events to an extent beyond the \$3,100, and that as his agreement was with David, by covenant, he has a right to recoup or offset the same against that demand.

Said defendants offer further to prove,

That the agreement of December 10th, 1853, made between David and Ford was cotemporaneous with, subject to, dependant upon, part of, and to be construed in connection with an agreement made and entered into by and between David and one Ruth Ann Ross, bearing date, December 10th, 1853, whereby said David agrees to sell, and said Ross agrees to buy the Mercantile Hotel, &c., within three weeks from that date, for the sum of \$24,000, which agreement fell through, and was abandoned, of all which said Ford had due notice, and was privy to at the time.

The Court overruled, on said motion, all of these offers on the part of David, except the 7th and 10th, which was admitted by the plaintiff's attorney; and all on the part of Turner, except the last part of the 1st, after the word "profitableness;" and the 2d.

To which decision, overruling as aforesaid, and said denial of said motion, the said counsel for defendants excepted, and the said counsel specifically excepted to the decision and ruling of the said justice upon each and every of the said offers, and each and every of the said motions."

The said counsel for defendants David, and Turner, then called and examined witnesses on their behalf severally.

Various exceptions were taken during the progress of the trial, not necessary to be stated. When the defendants, David and Turner rested, the said Justice made the following decision in reference to the answer of defendants Townsend and Johnson. (Exclusive of its recitals, it reads thus, viz. :)

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"It is ordered that the said defendants have leave to serve the answer to said supplemental complaint now proposed, on the following terms, to wit:

"Immediate payment of the costs of the demurrer and of the appeal thereon to the General Term of this Court, and the withdrawal of any appeal which may have been taken thereon to the Court of Appeals.

"A written consent on the part of the defendants, to be filed with the clerk immediately, that the testimony in the cause be taken as against the defendants, Townsend and Johnson, under their answer.

"That no further testimony be adduced on their behalf, except to those declarations of the plaintiff made to them or their agents at or about the time of their purchase, as to his, the plaintiff's claim in the premises, or, also, as to their knowledge of the agreements between the several parties or either of them as to Townsend's assumption of the sum of \$3,100 to the plaintiffs as provided in the agreement of the 10th of December, between the plaintiff and David.

"That any written contract or instrument under which Townsend and Johnson, or either of them, purchased the premises in question be produced forthwith, or affidavits of each defendant and their respective attorneys as to the loss of the same.

"That the question of the plaintiff's claim to board until the said \$3,100 be paid, be adjusted in this action down to the time of the trial thereof."

Whereupon the counsel for defendants objected as follows:

"The defendants Townsend and Johnson are willing to put in their answer without any qualification to it as proposed on the terms imposed by the Court, so far as the payment of the costs upon overruling their demurrers, and the appeal therefrom to the General Term is concerned, as soon as such costs are settled in amount, and adjusted. But they claim as a right that they have by the terms of this Court, overruling the demurrers, which allows them twenty days to answer upon payment of costs, that period of time to answer after the costs are taxed and adjusted, which as yet has not been done, or in other words that they have twenty days to pay the costs of the demurrers, and to answer after the sums which they are to pay as such costs shall

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be fixed. They, therefore, object to the Court prescribing any other terms than the payment of the costs immediately, which they will comply with as soon as they are adjusted; they further object to the Court allowing the plaintiff to try an independent cause of action not set up in the complaint; they further insist that the Court ought in furtherance of justice, to permit these defendants to maintain their answer exactly as proposed, and by any and all competent proof in their power to produce; and that the Court ought not to require testimony in the cause which may be competent and proper in respect to David and Turner, to be admitted as against these defendants, though incompetent and improper as to them; and that the Court ought not to abridge the right of appeal, if such right exists, from the decision of the Court upon the questions of law raised by the demurrers; nor ought the Court to embarrass a full and fair trial of the cause, and the issues presented by the answer of these defendants, most especially as the plaintiff makes no proof, or pretence even of any surprise by the answer.

"S. SANXAY,

"As counsel for dft.

"The counsel for the defendants is willing to make affidavit if the allegation be denied, that the costs of the demurrer have never been adjusted, nor even served, nor have any steps been taken by plaintiff's attorney to cause the same to be adjusted."

But the said Justice refuses to change his decision.

Whereupon the counsel excepted to the ruling and decision of the Justice upon each and every of such objections.

Said Justice made his decision, in writing, on the 6th of March, 1856, which, exclusive of its recitals, read thus, viz.:

"It is declared and adjudged by the Court, that the plaintiff do recover the sum of \$3,586, as well from the defendant Henry J. David, as from the defendant Don M. M. Turner, and from the defendant, Samuel P. Townsend, respectively, such sum being the amount of three thousand one hundred dollars, with interest, after deducting the amount of nineteen dollars and forty-three cents, an amount which it is further declared and adjudged is payable by the plaintiff, for the value of rooms occupied by him in the Mercantile Hotel, mentioned in the

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pleadings, from the third to the eleventh day of April, 1855, and that the plaintiff have execution against the defendants, David, Turner, and Townsend, severally, for such amount, being three thousand five-hundred and sixty-six dollars and fifty-seven cents.

"And it is further declared and adjudged, that the plaintiff is entitled to, and that he has an equitable lien upon the furniture and fixtures, and what remains of the furniture, comprised in the schedule to the mortgage given by the plaintiff to David S. Jones.

"And it is further declared and adjudged, that a receiver be appointed to take charge of such furniture and fixtures, and sell and dispose of the same, for the payment of the said sum of three thousand five hundred and sixty-six dollars and fifty-seven cents, and the interest thereon, until the same shall be paid.

"And that it be referred to John L. Mason to approve of a person to be such a receiver, and to report his name to this Court, with the amount of security proposed, and approved by him.

"And it is further declared and adjudged, that the plaintiff recover against the defendants respectively, except the defendant Johnson, his costs and disbursements, amounting to the sum of
and that he also recover from the defendants David and Turner only; the additional allowance of two hundred dollars, granted by an order of this Court.

"And it is further declared and adjudged that this judgment be without prejudice to the question of any liability of the plaintiff for lodgings after the eleventh day of April, 1854, and further, that the proceedings for the appointment of a receiver be suspended until the return of executions against the said Turner, David & Townsend, respectively, unsatisfied.

"M. HOFFMAN."

Various exceptions were taken by the defendants in due time, to the decision of the Court.

The printed case, contained a statement of the facts found by the Court, and its conclusions of law thereon, as follows, viz.:

Ford v. David.

N. Y. SUPERIOR COURT.

SAMUEL FORD,
against
 HENRY J. DAVID, DON M. M. TURNER,
 SAMUEL P. TOWNSEND AND JOHN
 JOHNSON.

Facts found by Justice, and
 his conclusions of Law.

This cause was tried before me without a jury, and the following are my conclusions of fact and law thereon:

That an agreement dated the 24th of October, 1853, was entered into between the plaintiff and the defendant David, a copy of which is set forth in the preceding case.

That another agreement dated the 3d of November, 1853, was also entered into between the same parties, a copy of which is also contained in the case. That a further agreement between the same parties, dated the 10th of December, 1853, was also entered into, and a copy thereof is set forth in the case.

That an agreement or instrument in writing was entered into and executed by and between the defendant David and the defendant Turner, dated the 26th day of January, 1854, a copy of which is also set forth in the preceding case.

That on the 28th of January, 1854, in pursuance of the last stated agreement, the defendant David made an assignment to the defendant Turner, of the leases mentioned therein; and also executed to him a bill of sale of the property, furniture and fixtures in the Hotel, subject to the conditions specified in such instrument, and particularly subject to the claim of the plaintiff for \$3,100, as mentioned in such agreement.

That upon leaving said Hotel, the plaintiff Ford was entitled to take away certain articles of furniture, and that there is not sufficient evidence to show that he carried away more than he was entitled to, nor the nature of what he did take away.

That no such representations were made by the plaintiff to Turner upon his purchase from David, as to exclude the plaintiff from a claim to board beyond two weeks, or to a claim for furniture, except as to articles of the value of fifty dollars only.

That the plaintiff with his family occupied rooms in the Hotel

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pleadings, from the third to the eleventh day of April, 1855, and that the plaintiff have execution against the defendants, David, Turner, and Townsend, severally, for such amount, being three thousand five-hundred and sixty-six dollars and fifty-seven cents.

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This cause was tried before me without a jury, and the following are my conclusions of fact and law thereon:

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That on the 28th of January, 1854, in pursuance of the last stated agreement, the defendant David made an assignment to the defendant Turner, of the leases mentioned therein; and also executed to him a bill of sale of the property, furniture and fixtures in the Hotel, subject to the conditions specified in such instrument, and particularly subject to the claim of the plaintiff for \$3,100, as mentioned in such agreement.

That upon leaving said Hotel, the plaintiff Ford was entitled to take away certain articles of furniture, and that there is not sufficient evidence to show that he carried away more than he was entitled to, nor the nature of what he did take away.

That no such representations were made by the plaintiff to Turner upon his purchase from David, as to exclude the plaintiff from a claim to board beyond two weeks, or to a claim for furniture, except as to articles of the value of fifty dollars only.

That the plaintiff with his family occupied rooms in the Hotel

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until May, 1855; that after the 3d of April, 1854, he boarded himself and family, and was not supplied by the keeper of the Hotel; and that the defendant's counsel have refused to permit the question of an allowance for the occupation of the rooms beyond the commencement of this action, which was the 11th of April, 1854, to be passed upon and adjudged.

I further find, as to the defendants Townsend and Johnson, that an assignment was made by the defendant Turner to one Thomas W. Wheeler, of the leases, furniture and fixtures of such Hotel, dated the 10th of February, 1854. That on or about the 9th of May, 1854, Wheeler, by his authorized attorney, sold and assigned the same to the defendant Samuel P. Townsend subject to the plaintiff's lien and claim thereon for the aforesaid sum of \$3,100, which said Townsend agreed to pay as part of the purchase money of the said property. That before the time of his purchase he knew the pendency of the present suit, the injunction and claim of the plaintiff, the agreement between him and David, and that the attorney of Wheeler had similar knowledge.

That the said Townsend in August, 1854, transferred to the defendant Johnson, one half of his interest in such Hotel, furniture and fixtures, and that Johnson had knowledge at the time of such purchase, of the claim of the plaintiff.

That the said Townsend and Johnson have not filed any answer to the supplemental complaint in this action, and that I have considered the allegations of fact contained therein respecting their acts and knowledge as admitted by them, and that the plaintiff is entitled to the relief therein sought against them and each of them.

And I find as conclusions of law, that the plaintiff, by force of the various instruments before stated, is entitled to recover the sum of \$3,100 with interest from the 31st day of December, 1853, deducting the sum of \$19,43, as of the 11th of April, 1854.

That the plaintiff is entitled to recover such sum, as well from the defendant David as from the defendant Turner, and from the defendant Townsend severally and personally, and may have execution against each and either of them until he receive satisfaction thereof.

That the plaintiff is entitled to a lien upon all the furniture in the Mercantile Hotel, which remains of the furniture comprised

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in the schedule, to the mortgage known in the case as the Jones mortgage, and is further entitled to a receiver to take possession of such furniture.

That the injunction allowed in this cause ought to be continued, and that in case the amount so adjudged to be paid, is paid by the defendant Townsend, that he be at liberty to apply on the foot of the judgment, for such judgment against any of the other parties as may be right.

That in my opinion, by the true construction of the agreements between the parties, and under the proofs in the cause, the plaintiff Ford was responsible for the occupation of rooms in the hotel from the third day of April, 1854, when notice was given him to remove, to the 1st day of May, 1855, at \$17 a week. But inasmuch as the counsel of the defendant objected to the Court passing upon this allowance for any time after the commencement of this suit, I have not charged the plaintiff with the amount of the same, but only from said 3d day of April to the 11th of such month.

MURRAY HOFFMAN."

On the 26th of December, 1855, a judgment was entered in conformity with the foregoing written decision.

The plaintiff excepted to the judgment of the Court, so far as the same determines that the agreement of the 10th of December, 1853, gave a right only to board and lodgings for plaintiff and his family for three weeks, and that the plaintiff was bound to pay for the use of the rooms after a notice to leave them; and that the plaintiff was bound to pay, according to the evidence, for the use of the rooms occupied by himself and family, from the 3d to the 11th of April, 1854, a period of 8 days, between the time of the refusal to board and the commencement of this action, the sum of \$19 43.

The plaintiff insisting that by the terms of the contract, bearing date the 11th of December, 1853, the defendant David was bound to board the plaintiff and his family in the Mercantile hotel, as long as the said \$3,100 mentioned in said agreement remained unpaid.

The plaintiff appealed to the General Term from so much of the judgment entered in this action on the 26th day of

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December, 1856, as allows the defendants the sum of nineteen dollars and forty-three cents for the use of rooms occupied by plaintiff and his family in the Mercantile Hotel, in the city of New York, from the 3d to the 11th day of April, 1854.

The defendants appealed from the whole judgment. (The appeals were submitted on the 5th of June, 1857.)

Wm. W. Northrup, for plaintiff.

S. Sanzay, for defendants.

BY THE COURT. BOSWORTH, J.—The judgment appealed from was rendered upon a trial of issues of fact joined between the plaintiff, and David, and Turner respectively, and upon determining, at the same time, the relief proper to be granted as against Townsend & Johnson, on overruling their demurrer to the original and supplemental complaint.

It is insisted that the Court erred at the trial, in refusing to permit the defendant Townsend to interpose an answer to the complaint at that time.

This demurrer was overruled on the 30th of March, 1855, but liberty was given to him to answer the complaint in twenty days, upon payment of costs. Instead of availing himself of that offer, he appealed from that order to the General Term, and on that appeal the order was affirmed, with costs, on the 10th of November, 1855. This action came on to be tried on the 28th of February, 1856, and it was during that trial that Townsend tendered his answer. To the decision of the Court refusing to receive it, Townsend excepted.

Even if it be conceded that Townsend had the same time to answer after the decision by the General Term that was given to him by the order of the 30th of March, 1855, he should have tendered his answer within twenty days after the decision of affirmance, by the General Term, or within twenty days from the 10th of November, 1855.—*Sands v. M' Clelan*, 6 Cowen, 582; *Hoadley v. Cuyler*, 10 Wend. 593.

By the terms of the order the answer must be put in within twenty days, or the right to answer was gone. None was tendered within that time, nor until after the trial had commenced,

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upon notice of it duly given to all the defendants. There was no error, which is the subject of an exception, in refusing to permit Townsend to put in an answer at the trial.

The decisions—that the action was triable by the Court; that it should be disposed of at the trial as to all the parties, and by a single judgment; that the Court had jurisdiction of the action; and that the complaint stated facts sufficient to constitute a cause of action;—were correct, and need neither argument nor authority to show their accuracy.

Each defendant appeared by his attorney at the trial. On the trial the agreements of the 24th October, 1853; November 3d, 1853; and December 10, 1853; and also the agreement between David & Turner, of the 26th of January, 1854, were produced and read in evidence. The latter is inserted at length in the case. By the terms of the latter Turner bought, "subject to all the covenants, conditions, and terms contained" in the agreement between Ford & David of the 24th of October, 1853, and as a part of the contract price covenanted to pay the \$3,100 to Ford. By the terms of that instrument it was to remain in the hands of H. A. Mott, *in escrow*, until Turner paid the \$3,100 to Ford, or arranged it satisfactorily with him.

That agreement was recorded on the 20th of February, 1854. The agreement of the 28th of January, 1854, between the same parties, was recorded at the same time. The latter transferred the leases and property, "subject, however, to the claim of Samuel Ford of thirty-one hundred dollars, as mentioned in said agreement," of the 26th of January, and guaranteed that the property was free from encumbrances "otherwise than in said agreement is set forth, and said Ford's claim as aforesaid."

The assignment of each of the leases by David to Turner was, by its terms, subject to the "covenants, conditions, and terms" of the agreement of the 24th of October, 1853, and to the terms of the agreement of the 26th of January, 1854.

It necessarily follows that Wheeler, when he purchased from Turner, and also that Townsend and Johnson, when they made their several purchases, knew, or had notice of the claims and rights of Ford. There is no agreement or instrument of transfer, from Ford to Turner, which does not recite them.

Townsend and Johnson, by demurring to the complaints,

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admit the allegations, that they bought with notice, and Townsend, in the same way, admits that he agreed, as a part of the consideration money to be paid by him, to pay to Ford the \$3,100.

The plaintiff is entitled to recover this sum, out of the property, unless just claims to deductions have been properly proved which should be allowed, or unless the Court erroneously excluded evidence, in that behalf, which should have been received. Who of the several defendants, are personally liable for its payment, and in what order such liability should be enforced, will be stated hereafter. We will first notice some of the exceptions taken at the trial.

The answer of David was sworn to on the 25th of January, and of Turner on the 24th of May, 1854, and the Judge in refusing to permit an amendment of their answers, in February, 1856, nearly two years after both of them had re-sold their interest in the property, made a decision, which is not the subject of an exception.

Many of the matters, offered to be proved on the part of David and Turner, and embraced in their eleven written offers, and the five additional written offers on the part of Turner, except those which they were allowed to prove, constituted matters of defence not alleged in their answers. On that ground alone, they were inadmissible, and whether they should be permitted to so amend their answers, as to make such evidence admissible under them, was, in the most favorable view for the defendants that can be taken of such an application, a matter addressed solely to the discretion of the Judge.

An exception to his decision is not reviewable on this appeal. If it was, we should not regard it as erroneous.

David sold the leases and furniture on the 26th of January, 1854, and Turner on the 10th of the following February. The application was made in February, 1856, to amend answers which had been interposed in May, 1854, more than three months after Turner had sold the property, and had ceased to have any interest in it, except to conduct the business, as he says in his answer, as tenant of Wheeler.

The Judge, under such circumstances, might, with great propriety, refuse to permit such a mass of amendments to be made,

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the matter of most of which, if not of all of them, must have been known to the defendants when they put in their answers, if it can be supposed that the offers were made in the belief, that the defendants had it in their power to establish the facts which they proposed to prove.

The 2d, 3d, 6th, and 9th offers, and parts of some of the others, were offers of evidence which would contradict the clear legal import of the agreement of the 10th of December, 1853, and the express terms of the agreement of the 26th of January, 1854.

By the agreement of the 10th of December, 1853, David agreed absolutely, and unconditionally, to pay \$3,100 to Ford, for the interest of the latter in the hotel, as set forth in the previous agreements of the 24th of October and 3d of November, and Ford was to retain all the furniture, not included in the schedule, annexed to the mortgage, which had been executed to Jones.

Ford was to be paid this sum at all events, and was to leave the hotel when it was paid. Whether he was at liberty to remain more than three weeks without charge, if not paid within that period, is a different question. The three weeks, within which it was to be paid at all events, expired with the 31st of December, 1853.

David & Turner, in their contracts of the 26th and 28th of January, 1854, seem to have construed the contract of the 10th of December as requiring David to board Ford free of expense, until the \$3,100 was paid; David exacted a covenant from Turner to pay Ford that sum, as being due to him by the contract of the 10th of December.

The Court at Special Term, held Ford chargeable with room rent at \$17 a week, from the 3d of April, 1854, to the commencement of this action, which was on the 11th of that month.

Although the Court held that Ford had no strict right to be furnished with board and rooms, without charge, after the expiration of three weeks from the 10th of December, 1853, it also held that no abatement from the \$3,100 could be allowed for the use of the rooms occupied by Ford, subsequent to the commencement of this action, for the reason, that the enquiry as to the value of board and of the rooms used had been limited to

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that date on the trial, on the objection taken by the defendant's counsel "to any proof subsequent to April 11th, 1854, when suit was brought."

It is too late for the defendants, after having induced the Court at the trial to make that decision, to insist that it was erroneous.

No such inquiry could have been allowed as a matter of right, in behalf of Townsend & Johnson. Instead of asserting by answer a right to reduce the claim of Ford to be paid the \$3,100 on account of board and rooms furnished to him by David & Turner respectively, they demurred to the original and supplemental complaints, and admitted their material allegations to be true.

The opinion of the Court at Special Term shows, that the Court came to the conclusions, that David acquiesced in the justice of Ford's claim to board down to the time that David sold to Turner, and that no allowance was made to David for boarding Ford after the three weeks, for the reason that it had been voluntarily furnished, as being Ford's strict right.

On the same grounds, it was not allowed to Turner for the period between the date of his purchase and the time he notified Ford that he would not board him longer without being paid for it, which was done on the 8d of April, 1854.

The evidence strongly favors the conclusion that the parties adopted and acted upon that construction of the contracts, until Turner notified Ford to the contrary, on the 8d of April, 1854.

David, on selling to Turner, required a covenant from him to pay Ford \$3,100: this was deducted from, and was part of the contract price which Turner was to pay for the property; requiring Turner to pay this sum directly to Ford, in satisfaction of a corresponding amount of the contract price, and transferring the property, subject to Ford's claim upon it for that sum, in connexion with the other facts, might reasonably bring the Court to the conclusion which it formed.

The supplemental complaint states that Townsend bought and took a transfer, "subject to the plaintiff's lien and claim thereon for the aforesaid sum of \$3,100, which the said Townsend assumed and agreed to pay off and discharge, as a part of the purchase money of said property."

Townsend & Johason, by their demurrers, admit the truth of these allegations.

We think there was no error in not making an allowance to David or Turner, for boarding Ford, prior to the time when it was intimated to him that he must pay board in the future, or leave the premises.

But we are of the opinion that Ford had no strict right to be boarded at the expense of David, or of those succeeding to his interest, after the 31st of December, 1853.

Non-payment of the \$3,100, within the three weeks, gave Ford a right to rescind the agreement of the 10th of December, 1853. If he had taken that stand, and *had* his rights adjusted under the two agreements of a prior date, his condition might not have been as favorable as it would be on being paid the \$3,100. But he was not obliged to rescind; and if he did not rescind, he was not obliged to waive his lien or release his rights until the \$3,100 was paid. But if he chose to retain the agreement, he would be obliged to look to the property, and such persons as had, or might become liable to pay the \$3,100, for payment. All that he could demand, as a strict right, was \$3,100 and three weeks board.

The substantive cause of action stated in the complaint, consists of a lien upon the property in question, for the \$3,100 and interest, with a right to have it satisfied out of the proceeds of the property, on a sale of it under the judgment of the Court.

If the property shall not produce enough to satisfy the lien, Turner and David are severally liable to make good any deficiency.

In the opinion of the Court, accompanying the decision made in October, 1855, upon the demurrers of Townsend and Johnson to the original and supplemental complaint, no discrimination was made between the several liability of David and Turner to make good any deficiency, and that of Townsend. Although it was stated that Townsend was liable to the plaintiff for such a deficiency, yet a decision of that point was not essential to sustain the order then made. Whether the position of Townsend to Ford, as to personal liability, was different from that of David and Turner, does not appear to have been a subject of consideration.

David contracted with Ford to pay to him the \$3,100, and,

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therefore, was personally liable to Ford to make such payment. Turner promised David, who was thus personally liable to Ford, to pay to Ford the same sum. This promise was based upon a valuable consideration, and is one which Ford can enforce for his own benefit, to make good any deficiency in the proceeds of the property to satisfy Ford's claim. (*Halsey v. Reed*, 9 Paige 446.)

But the promise of Townsend to pay the \$3,100, was made to Wheeler. It is not alleged that Wheeler was ever personally liable for the payment of it, or promised any one, as part of his own contract of purchase, to pay the \$3,100, or any part of it.

King v. Whitley, 10 Paige 465, is in point, and determines that Ford has no personal claim upon Townsend, for any deficiency upon such a state of facts.

In *Trotter v. Hughes*, 2 Kern. 74, the Court of Appeals, approved of *King v. Whitley*, as a sound exposition of the law.

It follows that the judgment must be modified.

We regard the cause of action stated in the complaint, as single. It is a claim to have the \$3,100 and interest, or so much of it as may be due, declared a lien upon the property, and ordered, by a judgment of the Court, to be satisfied out of it, by a sale of it, and an application of its proceeds to pay the amount due.

The several liabilities of David and Turner, are collateral matters, and may be enforced to make good any deficiency. (*Halsey v. Reed*, 9 Paige, 446.)

The judgment should be modified so as to require the proceedings for the appointment of a receiver to be concluded and perfected and the property to be sold by the receiver, and the proceeds applied to satisfy, as far as they will go, the amount due to Ford, and that for any deficiency, execution issue, *first* against Turner, and on the return of the same unsatisfied, in whole or in part, execution for such deficiency as may then exist, be *then* issued against David.

As to the questions, whether the action abated, by the transfers made by Ford, *pendente lite*, or whether it was indispensable, before proceeding to trial, that those who had succeeded to his interests should be made parties, it is sufficient to say that the assignment of the 16th of September, 1854, by Ford to Parmly,

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and by Ford to Winchester on the 17th of October, 1854, and the appointment of Valentine as receiver of the property of Ford, by order of the 21st of May, 1855, did not abate the action. Code, § 121.

By that section of the Code, it was discretionary with the Court to allow the action to proceed in the name of Ford, or to substitute as plaintiffs those to whom his interest had been transferred. After all the present defendants had been made parties, and after all these transfers had been made, a motion was made that such substitution should be ordered, and it was denied.

Instead of appealing from that order to the General Term, all parties acquiesced in it, so far as the record discloses what occurred.

That order, and suffering the time, within which an appeal could be taken from it, to elapse without appealing; preclude the defendants from now raising the question whether other parties should have been substituted as plaintiffs.

The Court having determined that the action should proceed in the name of Ford, it necessarily follows, that all proceedings appropriate to enforce the cause of action stated in the complaint, have been, properly and necessarily, taken and prosecuted by him, and in his own name.

The views stated, dispose of the appeal taken by the plaintiff. The judgment must be modified so as to conform to the views hereinbefore expressed, and in all other respects affirmed. Judgment accordingly.

BUCHANAN & KILMER, Plaintiffs and Appellants, v. MORRELL,
O'HARA, and CAMPBELL & SMITH, Respondents.

In all actions, whether of contract or tort, whenever a plaintiff calls one of several defendants, and by examining him gives evidence tending to establish a cause of action against all jointly, and by establishing which all may be charged with the same amount for which either, on the same facts, would be liable if sued alone, the other defendants may be examined, as witnesses in their own behalf, to the same cause of action.

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It will make no difference, that the Court may be competent in such action and on such facts, in the exercise of its equitable jurisdiction, to charge the defendants so offering themselves in their own behalf to pay a part only of the whole sum claimed, or if charged with the whole, to direct that they be so charged only in the event that all cannot be collected of their co-defendant, and to order that they pay only so much as may not be collected by execution against him.

Defendants may be "united in interest," in respect to a matter involved in the issues, within the meaning of those words as used in § 397 of the Code, though not sued as partners or joint-contractors, and though sued upon a cause of action on which a separate suit against each could be maintained.

(Before BOSWORTH and WOODRUFF, J.J.)

Argued, June 8; decided, Oct. 17, 1857.

THIS action comes before the Court on an appeal by the plaintiffs from a judgment in favor of the defendants. The only questions presented by the appeal relate to decisions of the Court at the trial, permitting the defendants Smith & O'Hara to be examined as witnesses in their own behalf. The action was tried in October, 1856, before BOSWORTH, J., without a jury.

The plaintiffs, before commencing this action, had recovered a judgment against the defendant Morrell, and had purchased other judgments recovered against him by third persons, on all of which executions had been returned unsatisfied.

This action was brought by them as such creditors, to procure transfers of property made by Morrell to O'Hara, to be set aside as fraudulent and void, and for other relief, as hereinafter stated. The complaint states, the recovery of the judgments, the issuing of executions thereon, and the return of the same unsatisfied, and the assignment to the plaintiffs, of those recovered by other persons as plaintiffs.

That Morrell was a manufacturer of blank books and stationery in the city of New York, having a store containing blank books and stationery, worth from \$10,000 to \$12,000, and machinery and stock in his factory worth about \$14,000, the machinery being subject to a chattel mortgage for \$5,500, held by John Campbell & Co. (a firm composed of the defendants Campbell & Smith), and being worth some \$1500 less than the mortgage upon it.

That after Morrell contracted the debts on which the judgments were recovered, and in or about October, 1852, he failed in business and stopped payment.

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In anticipation of and shortly previous to such failure, "he conspired with the defendants Smith & O'Hara, to dispose of his property in fraud of his creditors, and to conceal or cover up the same so that his creditors could not reach it, and" * * "in pursuance of this scheme, and with intent to delay and defraud the said creditors, the said Smith and O'Hara mutually arranged and agreed, that after the transfer should be made to O'Hara, as hereinafter mentioned," the chattel mortgage should be foreclosed and the property sold and bid in by Smith; and O'Hara should pay Smith the difference between the price at which the property sold and the amount of the mortgage.

"The defendants Smith, O'Hara, and Morrell, further arranged and agreed that all the property in the store and factory should be transferred and delivered to O'Hara, at the nominal price of \$8,000, which the said O'Hara should pay in notes, and which notes Morrell should use in effecting favorable compromises with his creditors." * * "It was further arranged and agreed between the defendants, that the defendant O'Hara should go on, in his own name, with the business previously conducted by Morrell, and should employ Morrell as managing agent, at a nominal salary of \$1,000 a year; that the business should be thus continued for two years, to give Morrell an opportunity to buy up at a low rate the claims against him held by his creditors, and at the end of that time O'Hara should pay over and re-deliver to Morrell all the residue of the property and effects, and the proceeds and profits thereof, after deducting \$4,000 a year for his own compensation, and the amount of the notes so given by him as aforesaid;" and "if Morrell could procure a purchaser of said property at a fair price, the said O'Hara should sell the same to said purchaser in his own name, and after making the deductions above mentioned, should pay over the balance to said Morrell."

"In pursuance of this arrangement," Smith foreclosed the mortgage and bought the property for \$4,000, and immediately transferred it to O'Hara, who paid Smith \$5,500 therefor, and Smith paid over this money to said firm of John Campbell & Co.

"Also, in pursuance of said arrangement," the other property of Morrell in the factory, and that in the store, were transferred

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by Morrell to O'Hara for said sum of \$8,000, paid in notes as aforesaid, who continued in the business, employing Morrell as managing agent, and the said O'Hara has made a large profit thereon, at least \$5,000 a year; and the said O'Hara still continues in said business, and in possession of the said goods and property, or the proceeds and profits thereof.

Wherefore, the plaintiffs demanded judgment, that the transfer made by Morrell to O'Hara be adjudged fraudulent and void, that a receiver be appointed to take possession of the said property, and the proceeds and profits thereof; that O'Hara account to the receiver for the profits of said stock and manufactory, and that Campbell and Smith be compelled to pay to the Receiver the \$1,500 which Morrell had paid to Smith, and that the receiver apply the property he might receive, to pay the said judgments held by the plaintiffs.

Campbell and Smith answered jointly, and O'Hara put in a separate answer, denying the conspiracy and all fraud. Morrell did not answer the complaint.

On the trial the plaintiffs examined Morrell as a witness in their behalf, and he gave evidence tending to establish all the allegations of the complaint, except as to the recovery of the judgments, the issuing of executions thereon, and the return of the same unsatisfied. And he also "gave evidence tending to prove that the transfers of property alleged in the complaint to have been made by Morrell to O'Hara were made in pursuance of a preconcerted scheme between Morrell and the defendants Smith and O'Hara, thereby to defraud the creditors of Morrell, and hinder and delay them in the collection from him of their just claims and demands against him."

"After the plaintiffs had rested their case, the defendant, Augustine Smith, offered himself as a witness, whereupon the plaintiffs' counsel enquired, in whose behalf he was offered? To this, it was answered, that he was offered for the defendants generally, including Augustine Smith, and excluding the defendant Morrell. The plaintiffs' counsel objected to said Smith being examined in his own behalf, and also to his being examined for the defendants generally."

The Court overruled each of said objections, and to such decision the plaintiffs' counsel then and there duly excepted.

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O'Hara was also offered, when the same proceedings were had as when Smith was offered, and the same decision was made and exception taken.

Smith, and O'Hara, were severally sworn and examined, on behalf of all the defendants, including himself, and excluding the defendant Morrell.

The Court gave judgment for the defendants, O'Hara, Campbell, and Smith, dismissing the complaint as to them. From that judgment the plaintiffs appealed to the General Term.

D. D. Field, for appellants,

Insisted that, the defendants, O'Hara and Smith, were not competent witnesses for themselves. They were not united in interest with Morrell so as to make them competent, because he had been examined.

The test, under section 397 of the Code, is this: Could Morrell have been called by his co-defendant as a witness for them, or could they have been called for him? If this could have been done then he is not "united in interest" with them. That they could have been called for each other is clear, under section 397, 10 Barb. 112; 1 Kern. 131; 3 Kern. 266.

The expression "united in interest" is used in section 119, 157 and 306. Under section 119, it is clear that if either Morrell, O'Hara or Smith, had commenced an action in respect to the assigned property, he need not have joined the others with him. Under section 156, it is clear that Morrell could not have verified an answer for O'Hara and Smith. And under section 306, it is clear that the Court could give costs against Morrell, and for O'Hara and Smith. Indeed that was done in this very judgment.

Indeed, the union of interest intended by section 397, is such as must necessarily make the judgment a joint one, whatever it be.

C. O'Connor, for respondents, made and argued the following points.

First Point.—The 397th section of the Code covers this case. The part in italics was passed in 1849, and sections 390 and 391 are original sections. The case of *Comstock v. Doe & Roe*, 2 Code

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Rep. 140, shows that it is not whether a party be a joint contractor or joint conspirator, that allows him to be a witness, but the fact that he is sued as such.

Second Point.—The exception rests upon a criticism upon the words, "united in interest." This criticism will not avail: because—

1. The word conspiracy denotes being united in interest, and a joint design, 18 Wendell, 343.

2. Morrell did swear to a joint fraud, a joint illegal act; and before the Code, to have permitted such testimony would have been against fundamental principles, 19 Wendell, 293.

3. It being clear that the defendants were charged to have been united in a fraud; this is being united in interest.

See Webster. Definitions:

To interest—means, to concern, to affect.

Interest (noun)—concern.

Interested—made a sharer; affected; concerned in a cause, or in consequences.

Third Point.—The Legislature never could have intended to allow a defendant, to conspire with the plaintiffs to charge himself and selected co-defendants with frauds, and prevent such co-defendants from denying such a charge. If they did, there is no protection under the Code for life, liberty or property.

BY THE COURT. BOSWORTH, J.—Whenever one, of several defendants, "who are joint contractors, or are united in interest, is examined by the adverse party," the other of such defendants may offer himself as a witness to the same cause of action or defence, and shall be so received. (Code, § 397, 390.)

Were the defendants, Morrell, O'Hara, and Smith, "united in interest," within the meaning of those words as used in § 397 of the Code, as they stood before the Court when O'Hara and Smith were permitted to be sworn?

It is quite clear that those words do not denote and include those defendants only, against all of whom, a plaintiff, prior to the Code, must have recovered, or recover against none.

Nor do they designate and include only such defendants as are jointly liable on contract. In actions of assault and battery, trespass, trover, and other actions of tort, which in their nature

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may be joint or several, and which, before the Code, might have been brought against each wrong-doer separately, or against all jointly, and in which, if several were joined as defendants, the plaintiff might recover against some, although he failed to recover against others; one defendant cannot be a witness for his co-defendant, after evidence has been given by the plaintiff, which is sufficient to charge all as joint wrong-doers; to prove any fact, which, if true, and if proved by competent testimony, would exonerate all from liability, or which would mitigate damages.

The reason is, that as to such matter he is jointly interested with his co-defendants, and all being joint wrong-doers when sufficient evidence has been given to establish a joint liability; whatever damages the plaintiff has sustained, he is entitled to recover against all. In such an action, after proof of such facts, there cannot be separate verdicts, in favor of the plaintiff, against the different defendants. (*Dean v. Thornton and Dutton*, 3 Kern. 266.)

This case decides, that if the plaintiff had proved by witnesses, not parties to the record, that Morrell, O'Hara, and Smith, had concocted and agreed between themselves upon a scheme by which the property of Morrell should be transferred to one of their number for the purpose of defrauding Morrell's creditors, and in pursuance and execution of such scheme, and with that intent it had been so disposed of by Morrell; neither of such defendants could have been a witness for the others to disprove such cause of action. Such evidence, if given by a third person, would, as effectually exonerate all, as either, and as to such matter, they would be jointly interested. (*Beal v. Finch*, 1 Kern. 135-6.)

When a combination among several to commit a wrong is established, each is responsible for the acts of the other, which are done in execution of, and pursuant to the agreement or scheme, in which they united to do the wrong.

It can make no difference, that the pecuniary interest of Morrell to prove the fraud, was greater than his interest to disprove the conspiracy.

This proposition may be illustrated by a variety of cases. One will suffice.

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A plaintiff sues A. B. and C. D. on a note bearing the signature, "A. B. & Co.," and signed in the firm's name by A. B., alleging that the defendants were partners doing business under the name of A. B. & Co., and that they made the note in their co-partnership name.

In such an action, before the Code, the plaintiff must have recovered against both defendants or neither.

On the trial, the plaintiff may now call A. B., and prove by him that C. D. was his partner when the note was given, and that it was given in the due course of the partnership business. In such a case, C. D. would be clearly admissible in his own behalf to disprove the cause of action, which A. B. had been examined to establish.

And yet in such a case, A. B.'s pecuniary interest would be in favor of the plaintiff, because by establishing the fact that C. D. was his partner, he would be benefited by subjecting him to a liability to pay the debt.

And yet, in such an action, if C. D. had put in an answer, under which the evidence was admissible, A. B. might be called by him to prove that C. D. was a minor, or a married woman, and therefore not liable at all, although an actual joint contractor.

Brumskill v. James & Eaglesum, 1 Kern. 294; *Marquat v. Marquat*, 2 Kern. 336: This shows, that whether the action be contract or tort, the pleadings alone, and the cause of action which they state, are not the exclusive tests by which to determine whether several defendants are united in interest, in respect to matters in relation to which the testimony of some or one of them has been given or may be offered.

This Court has decided, at General Term, that in an action against the members of a firm, upon a guaranty of the debt of a third person in the firm's name, where one defendant plead that it was signed by the other partner without his knowledge or consent, and in a matter not relating to the partnership business, he might call the partner who signed the firm's name, to prove the facts, and that, the proof being satisfactory, the defendant so pleading was entitled to a verdict, and the plaintiff could have a verdict and judgment against the other defendant. (*Clafin v. Butterly*, 5 Duer, 237.)

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But such an action as the pleadings state it, and the plaintiff seeks to enforce it, is one in which the defendants are joint contractors, or partners.

Hence it is obvious that it does not depend solely upon the nature of the action, nor upon the fact that several defendants are sued as joint contractors, or joint wrong-doers, whether one can be called as a witness for the other, or in other words, whether they are united in interest—as to the matter, in respect to which, one may be called to testify for the other.

In all actions, whether of contract or tort, one defendant may be a witness for his co-defendant, to prove that the latter was never liable, when that proof consists of facts which, though true, could be of no benefit to the testifying defendant, when proved by witnesses other than himself.

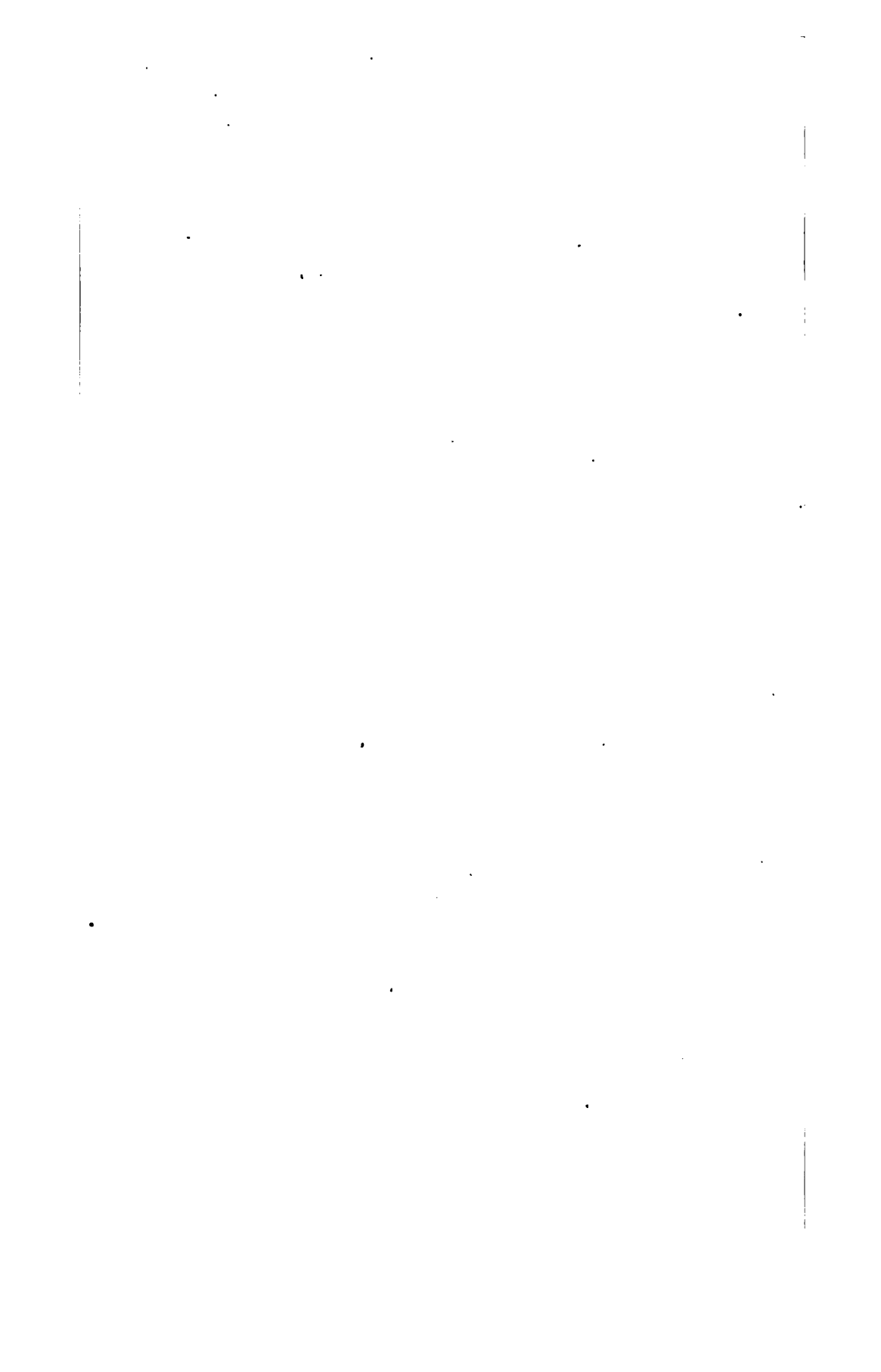
So in all actions, whether of contract or tort, there may be matters of defence which neither defendant is competent to prove on behalf of the other.

But in all actions, whether they be actions of contract or tort, whenever a plaintiff calls a defendant, and, by examining him, gives evidence tending to establish a cause of action against all jointly, and by establishing which all may be charged with the whole amount for which either would be liable on the same facts, if sued alone, the other defendants may be examined as witnesses to the same cause of action.

That disproving that cause of action will wholly defeat the right of the plaintiff to recover against either defendant, is no answer to the right of such a co-defendant to offer himself, and to be received. Such a result will follow in all cases in which neither defendant was guilty of a fraud, unless all had conspired to commit one.

We think the defendants Smith and O'Hara were "united in interest" with Morrell, within the meaning of those words, as used in § 397 of the Code, as to the cause of action, which Morrell had been examined to prove, and which the evidence given by him tended to establish, and that, in consequence of his having been so examined by the plaintiffs, they severally had the right to offer themselves as witness to the same cause of action, and to be examined accordingly.

The judgment must be affirmed.



CASES OF PRACTICE
AND
DECISIONS IN SPECIAL PROCEEDINGS
AT THE
GENERAL AND SPECIAL TERMS
AND AT CHAMBERS.

DRAPER, Plaintiff and Respondent, v. WILHELMINA HENNINGSEN, sued with her Husband, Appellant.

There is no authority in the provisions of the Code concerning the examination of a party as a witness, at the instance of the adverse party, for an order directing the party sought to be examined to appear before a referee and submit to be examined before such referee.

Semble. If the examination is to be as of a witness examined conditionally, a summons must be issued to compel the attendance of the party whose examination is sought. An order is only necessary to show the existence of facts giving a right to so examine, and to authenticate the proceedings. The witness does not attend in obedience to the order, but in obedience to the summons. If the examination is had before, instead of taking it at the trial, no order is necessary. A notice to the party, and that alone, is necessary to give the right to examine, and a summons is necessary to compel attendance and lay the foundation for ulterior proceedings, in case of non-attendance in obedience to it.

It is not obvious that any order for the conditional examination of a party as a witness can, properly, specify and limit the matters to which he is to be examined. He is to be examined generally the same as any other witness, and the points to which he may be examined are to be determined by the officer before whom the examination is had, or at the trial when the testimony is offered in evidence. Whether, when in an action against husband and wife, the complaint states as a cause of action, facts which, if proved, will entitle the plaintiff to a judgment against the husband personally, and he has not been served with the summons, nor appeared in the action, and the means provided by law for compelling his appearance have not been exhausted, the wife can be proceeded against at all, or whether she can

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appear by an attorney employed by her, without a previous order of the Court for that purpose, or whether she can be compelled to be examined at all to establish the allegations in such a complaint, when proof of part of the allegations requisite to be proved, to charge her separate estate, if she have any, will subject the husband to a judgment for the amount sought to be collected from her property, *quære?*
(Before OAKLEY, Ch. J., DUEB, BOSWORTH, HOFFMAN, SLOSSON and WOODRUFF, J.J.)

Heard, April 11; decided, April 18, 1857.

THE defendant appeals from an order made March 13, 1857.

This action is brought against husband and wife, defendants. The complaint avers, that one Hiram Cranston furnished board and necessaries, and performed labor and services, to and for the defendants, at their request, at the price and to the value of \$468 78, and lent and advanced to the wife, at her request, \$42.

That the wife had, and still has and owns, in her own right and as her absolute property, separate and apart from her husband, personal property exceeding in amount and value the sums aforesaid, and also real estate and chattels real, the income whereof exceeds such sums.

That on the 21st of August, 1856, the husband drew his bill of exchange upon one Belt, of Augusta, Geo., for the amount of the said two sums (viz. \$510 78) payable to the order of the wife, and that she, with a full knowledge of the consideration, and with intent to secure the payment of the said sum, and to charge and create a lien on her said separate estate and property, and to bind the same for the said sum of money, with the knowledge and assent of her husband, did endorse the said bill of exchange, and deliver the same to the said Cranston.

The complaint then avers presentment, refusal to accept, and refusal to pay, and notice to the defendants, and an assignment of the claim, &c., to the plaintiff.

The plaintiff then prays a discovery of the amount, value, character, situation, description, and other details of the separate property of the wife, and that the Bill of Exchange may be declared a charge, and lien upon such separate estate and property, and the income thereof—and that so much as may be necessary to satisfy the same; and the costs of this action may be subjected and applied to such satisfaction. That a receiver of such separate estate may be appointed, and that an injunction issue to

restrain the wife from disposing of or incumbering the said separate estate and property.

To this complaint the defendant, Wilhelmina, has put in an answer by attorney, in which all of the allegations in the complaint are denied.

It does not appear that the husband has been served with process in the action, or that any steps have been taken to bring him into Court, or procure his appearance. It was stated on the argument of this appeal that he is absent from the United States, in Nicaragua.

On the 13th of March, 1857, an order was made at the special term, on the plaintiff's application, by which the defendant, Wilhelmina, was ordered to appear, and be examined as a witness in this action for the plaintiff, as to any matter of fact affecting her liability in this action, or relating to her property and estate, separate and apart from her husband, before Henry S. Lincoln, Esq., (who was thereby appointed referee for that purpose) at such time as the said referee might appoint upon two days' notice to her.

From this order, the said Wilhelmina appeals.

Mr. Blankman and *Mr. Ashmead*, for the appellant.

A. R. Dyett, for the respondent.

BY THE COURT. WOODRUFF, J.—The order appealed from is supposed by the respondent to be warranted by chapter sixth, of title 12th, of the Code of Procedure, which chapter relates exclusively to the examination of parties to the action, and parties for whose immediate benefit the action is prosecuted or defended.

The first section of that chapter (viz. § 389) provides that no action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter.

Passing by, for the present, many of the important questions discussed on the argument of the appeal, and for the moment assuming that the complaint states a cause of action against the

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wife (the appellant) and that she is properly before the Court by her attorney, and that she is subject to examination in this action under the chapter above referred to, it may perhaps dispose of this appeal, if we enquire whether "the manner prescribed by this chapter," contemplates or sanctions the order appealed from.

The sections prescribing the manner in which the examination of a party may be had, are the following; § 390 provides that a party to an action may be examined as a witness at the instance of the adverse party, and for that purpose may be compelled, in the same manner, &c. &c., as any other witness, to testify either at the trial or conditionally, or upon commission.

Section 391 provides that such examination may be had at any time before the trial * * before a Judge of the Court, or a County Judge on a previous notice * * of at least five days, unless for good cause shown the Judge order otherwise; and § 392 provides that the party to be examined as in the last section provided, may be compelled to attend in the same manner as a witness, who is to be examined conditionally.

Section 394 declares the consequences of a refusal to attend, and testify; but the above sections are all that prescribe "the manner in which the examination of a party may be had."

By these sections it is entirely obvious that the examination of the party is to be procured in the mode, already well regulated by other statutes, of compelling witnesses to attend and testify, and this must be the guide in procuring that attendance.

This is so familiar to all practitioners that it seems hardly necessary to repeat it.

If the examination is to be had at the trial, no previous order is necessary. A subpoena must be issued, and served as pointed out in 2d. Rev. Stat. p. [400] § 52, [42] and this, of course, requires the witness to attend at Court.

If the examination be as of a witness examined conditionally, a summons to the witness must be issued by the Judge (2 R. S. 393, § 10,) which must be served in the manner prescribed by § 54 [44] of 2 Rev. Stat. p. [401]. The witness attends in obedience to the summons, not in pursuance of any order made upon him. The summons, in such case, is issued in lieu of a subpoena under the seal of the Court, and is served in like manner.

It is true that an order must be procured, based upon proper affidavits, showing that the exigency exists which renders a *de bene esse* examination proper, but that is not an order requiring the attendance of the witness; it is made for the purpose of authenticating the examination which is to be had upon a proper summons to be issued, and although it in form requires the attendance of the adverse party, yet that is merely for the purposes of notice, in order that he may attend if he thinks proper, and either take part in the examination of the witness, or show cause why the examination should not be had. If he do not choose to attend, he cannot by order be required to do so. The witness, as such, has nothing to do with the order: the efficient means of procuring and compelling his attendance, is the issuing and service of a summons under the hand of the Judge.

If the examination sought be, not as of a witness examined conditionally, but is claimed in the exercise of the option given by § 391, allowing it at any time before the trial, then no order whatever is necessary. That examination may be had upon five days notice, subject, of course, to the power of the Judge over the subject when the parties appear before him. And in this proceeding, the manner of procuring the attendance of the party as a witness is the same as last above stated, viz. by summons; as to a witness to be examined conditionally (§ 392).

We find in these provisions no warrant nor authority in the Court, to make any order on the subject.

Nor for any proceeding by order, either of the Court or Judge, requiring the witness to attend and be examined.

Still less do we find any power in either the Court or Judge to make an order requiring the witness to attend before a person not a Judge, and therein constituting such a person a referee, for the purpose of taking such examination. When the proceeding is to obtain a *de bene esse* examination of the party, in the mode prescribed for the conditional examination of a witness about to depart from the State, or who may not be able to attend the trial; then, after hearing the parties to the action, under a proper order to show cause, the Judge to whom the application is made may appoint a referee to take the testimony, (Laws of

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1851, chap. 472); but there, as in other cases, the order does not direct the attendance of the witness—his attendance before the referee is to be procured by summons. And the order appointing the referee is made, not by the Court, but by the Judge exercising a special authority.

The order appealed from is an order of the Court at Special Term; it is not an order purporting to determine that a *de bene esse* examination is proper under the circumstances proved; but it purports to be the mandate of the Court to compel the attendance of the witness out of Court and before a person named as referee for the special purpose.

When the examination is sought under the option given by § 891, to take the examination before the trial, and not as a witness examined conditionally, we find no power to appoint a referee.

We all concur in the opinion that the order was improvidently made, and that it cannot be sustained.

The order is liable to further criticism, which is not material, since the order must be reversed for the reasons stated; but it is by no means clear that any order, even for the examination of a witness conditionally, should declare the specific matters to which the witness shall be examined. Under the former Chancery practice, where a party might sometimes be examined, the common order provided that he be examined as to any matters as to which he had no interest in favor of the party examining him. But no such restriction is now necessary nor proper. The examination is to be the same as that of any other witness, and the matters as to which he shall be examined are to be determined either by the Judge before whom the examination is had, (unless upon cause shown he decides that the examination shall not then be taken,) or at the trial, when the testimony is offered in evidence.

These views were not all of them presented on the argument of the appeal, but we do not feel at liberty, when considering the rights of a *feme covert*, proceeded against when her husband has not been brought in, and when (as stated on the argument) he is absent from the country, to overlook considerations which we deem entirely conclusive upon the subject.

We have not been insensible to the serious nature of other

objections to the plaintiff's proceedings, to which our attention was called on the argument, and while we reverse the order upon the ground above specially assigned, it is not thereby intended to hold, that the plaintiff has shown by his complaint any sufficient cause of action against the wife (the appellant), to charge her as to her separate estate, or otherwise.

Nor that he can proceed against her, without doing more than merely name her husband as a party in his summons, and without bringing him in by appearance, so that he shall be a real as well as nominal party to the action; or, (if he be absent from the country,) without first exhausting the means which the law has provided for procuring his appearance, so that he may be affected by the judgment as on default of appearance.

Nor that a married woman, sued with her husband, can appear by attorney employed by herself, without a previous order of the Court for that purpose.

Still less do we mean to be understood as holding, that in this action the appellant can be examined as a witness in any form or by any mode of procuring her attendance. The debt set out in the complaint, if it exist, is her husband's debt, for which, without any legal consideration moving to her (other than such as is supposed to be implied in the act of endorsement), she has become the voluntary surety. No consideration for any charge or lien upon her separate property, (if any she has,) and no express underaking to charge such property appears.

It is clear that upon the allegations in this complaint, if proved, the plaintiff may have a judgment against her husband, in this action, for the amount claimed to be due. (*Marquat v. Marquat*, 2 Kernan, 336.) But it is not clear, in that state of the case, that the plaintiff can examine the wife as a witness, to establish the allegations in such complaint. It is not obvious that she can in any manner be so examined, that she will not be in the condition of a wife testifying against her husband, when the very facts alleged, and which must be proved in order to charge her, will, if proved, entitle the plaintiff to a judgment against her husband also.

That the Code has not made the wife a competent witness against her husband, has been repeatedly decided. (2 Code R. 19; 2 Sandf. 340; 4 Sandf. 596.)

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But without attempting to decide the questions above alluded to, it must suffice to say that the Court reverse the order appealed from, upon the grounds first above stated.

Order reversed, without costs.

GRAY, et al., Plaintiffs and Appellants, v. ROBJOHN, Defendant and Respondent.

An Action to restrain the defendant from violating his written agreement by which he covenanted to sell to the plaintiffs certain articles, manufactured by him after some secret process known only to himself; and not to sell similar articles to others; and by which the plaintiffs covenanted to sell such articles, and allow him therefor, a stipulated price, is not an action "for an adjudication upon an instrument in writing," within the meaning of those words as used in § 308 of the Code, as amended by CHAPTER 723, of the Laws of 1857, although the chief contest between the parties related to the validity, construction, and legal effect of such written agreement.

When an action is brought to recover a debt, or damages; or for a specific performance; or for an injunction; or for other like redress, and such is the relief which the complaint prays the Court to adjudge; it is the nature of the relief prayed, and not the evidence relied upon to support the plaintiffs' title to such relief, which determines the object of the action.

In such actions, the successful party is not entitled to an extra allowance under § 308 of the Code, notwithstanding the decision of them, may, incidentally, involve the construction of a written agreement.

The order, denying the grant of an extra allowance, affirmed.

(Before DUEK, Ch. J., and BOSWORTH, HOFFMAN, SLOSSON and WOODRUFF, J.J.)
 Heard, June 27; decided, July 11, 1857.

THIS is an appeal from an order, made at Special Term, denying the plaintiffs' application to overrule the decision of the clerk, who refused to allow the plaintiffs (who had obtained a judgment for the relief prayed for by their complaint), a percentage, or extra allowance, under § 308 of the Code, as amended by CHAPTER 723 of the Laws of 1857. The action was tried after that section, as thus amended, took effect. The facts are fully stated in the opinion of the Court.

BY THE COURT. WOODRUFF, J.—The plaintiffs herein, having recovered judgment in their favor, insist that they are entitled, as a part of their costs, to an allowance under §§ 308 and 309 of

the Code of Procedure, on the ground that the determination of the matter in controversy, involved an "adjudication upon a written instrument." From an order affirming the decision of the clerk, who refused to insert such allowance in the adjustment of the costs, the plaintiffs appealed, and that appeal now comes before the General Term.

The action was brought by the plaintiff to restrain the defendant from violating a written agreement, by which he had covenanted to sell to them, certain articles manufactured by himself after some secret process, of which he has knowledge, and binding him not to sell to others; and by which the plaintiffs, on their part, had covenanted to sell the article and allow him a price stipulated therefor. The complaint averred that the defendant was about to sell to others, and that he had on hand a quantity named, which he threatened to sell, and it sought an injunction as a means of compelling the performance of his agreement. The plaintiffs have obtained a decree, in substantial conformity to the prayer of their complaint.

The chief contest between the parties, was concerning the validity, construction, and legal effect of the written agreement. It, however, by no means follows, as we think, that the plaintiffs are entitled to an allowance.

The language of § 308 of the Code, so far as it bears upon the present question, is that "There shall be allowed to the plaintiff, upon the recovery of judgment by him in an action for an adjudication upon a will or other instrument in writing, the sum of ten per cent.," etc.

And § 309 provides that the rate shall be "estimated" upon the value of the property affected by the adjudication upon the will or other instrument.

Before the last amendment, the 308th section, in specifying actions in which an allowance should be made, gave it, in "an action for the construction of a will or other instrument in writing;" and by § 309 the rate of allowance was to be "estimated upon the value of the property affected by the construction of the will."

What considerations have led the Legislature to change the phraseology of these sections, in this particular, we have not learned.

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Under our former system it was not unusual for the Court of Chancery to entertain a bill by a plaintiff standing in the position of trustee, to settle the construction of a will, or other instrument, creating a trust. The Court exercised a jurisdiction of this sort, not in favor of any and every person who might desire advice respecting his own rights or obligations under a will or any other instrument, but only as an incident to the peculiar and exclusive jurisdiction which that Court had over trusts, in the execution of which, a trustee, in cases of doubt and difficulty, was permitted to apply for aid.

A jurisdiction of a similar description was necessarily exercised, when a bill was filed by a *cestui que trust* against the trustee, in like cases of doubt. But the primary object of the bill, in such case, was not to settle the construction of the instrument. It set up the claim of the plaintiff according to the construction for which he contended, and asked for relief in accordance with the claim. The construction of the instrument was only incidentally, though necessarily involved. It would, therefore, seem that it is only bills of the description, first above referred to, that could, in strictness, be called bills for the construction of wills or other instruments.

It is an action of this description that was provided for by the Code before the amendment in question, and we believe that no one, prior to such amendment, has ever intimated, because every action founded upon a written instrument, necessarily called upon the Court to read it, and determine the rights of the parties, according to its legal effect—in doing which the Court must consider, and for the purposes of the action, settle its construction—that therefore, an allowance must, in every such action, be made to the prevailing party.

Although the reason for a change of the phraseology of the section is not apparent, the substantial purpose and object, we think, remain the same.

There are cases in which a trustee seeks the advice of the Court, because the doubt, which embarrasses the execution of the trust, is a question of the validity of the instrument, while its meaning, if valid, is not obscure. Perhaps, cases of that sort were thought, by the Legislature, to be more fittingly described by the comprehensive term, "actions for an adjudication upon a

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will," &c. This would embrace questions of the validity, as well as questions of the construction of an instrument.

We will not undertake to say that, there can be no case in which an allowance can be made in virtue of these words, except when the action is brought by a trustee, though we do not recollect any case in which a bill, for the construction of an instrument, would be entertained, unless such construction was sought in aid of the performance of some duty, which it was the peculiar province of the Court of Equity to control, regulate, and enforce. If there be cases in which a plaintiff, not being a trustee, may come into Court "for an adjudication upon a will or other instrument in writing," and in which jurisdiction for that purpose will be entertained, doubtless an allowance will be proper. Under the more comprehensive terms "adjudication upon a will or written instrument," it may be that cases are embraced in which the object of the action is to obtain a judicial declaration that the will or instrument is void on its face. Such a judicial declaration is sometimes sought in equity, where the instrument is an impediment to the legal remedy of the plaintiff, e. g., a fraudulent deed or assignment impeding a levy and sale upon execution—or a deed invalid in fact, but being on record, operating as a cloud upon a title, and cases of a like character, where the relief sought is itself the judicial declaration that the instrument is invalid, and not where the relief sought is the recovery of money or other redress, and the question of construction or validity is only incidental, etc.

But the legislature in using the terms "an action for an adjudication upon," did not mean an action for damages for the breach of—nor an action brought merely to enforce—nor an action to restrain the breach of—nor an action to compel the specific performance of—nor actions generally, founded upon written instruments.—They have used the terms in a more restricted sense.

In truth, actions on bonds, bills of exchange, promissory notes, covenants, and written agreements, whether brought for damages, or in the last two examples for the specific performance, or for an injunction, involve an adjudication founded on the terms and legal effect of the written instrument, and if the doctrine contended for be sound, the prevailing party

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must have an allowance in all such actions. If this were so, the intention of the Legislature might have been, and we think would have been, much more clearly expressed. These actions are brought for a debt, or for damages, or for a specific performance, or for an injunction, and the like redress or relief, that being the object sought, and which the judgment is to award:— And the prayer of the complaint, is the money—the performance—the injunction—or other like relief or redress. It is this; the relief sought which determines what the action is for, and not the evidence by which the plaintiff's title to such relief is to be proved.

We think that the clerk was right in refusing to insert an allowance in the costs upon the adjustment, and his adjustment must be affirmed.

Order affirmed.

LEVY, EXECUTOR, &c., Plaintiff and Respondent, v. JOYCE,
Impleaded, Defendant and Appellant.

In an action, brought by the owner of property on which each of the several defendants claim to have a lien (under the Mechanics' Lien Law), to ascertain the amount and priority of their liens upon such property, and upon a fund produced by a judicial sale thereof, and to procure a discharge of such liens, and to determine the extent of the personal liability of such owner; a defendant, whose claim was not attempted to be proved on the trial of such action, further than to prove the pendency and condition of a proper proceeding in another Court to establish it; will be permitted, even after trial and judgment, to have the case so far opened, as to enable him to establish his claim, its amount, and its relative priority, when the omission to prove it at the trial occurred under such circumstances, as make it a case of excusable neglect, provided such relief can be granted without subjecting the other parties to any loss or damage, beyond the mere delay to which they will be thereby subjected, and provided also, that the party seeking such relief shall submit to such conditions as it may be proper to impose in order to protect fully the rights of the other parties to the action.

Especially will such relief be granted, when a refusal to grant it will cause a loss to the moving party of his entire claim, and it is clear that the proceedings on his part have been conducted in good faith, and the proceedings are novel in their character, and depend for their regularity and validity upon the construction of a statute, which has not received any judicial interpretation in relation to proceedings like those in question, and the grant of such relief can be made upon

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terms, which will not present any matter to be litigated except, the existence, amount, and relative priority of the applicant's claim, and he consents, as a condition to being relieved, to pay to the other parties their just costs of the further litigation as to his claim.

(Before DUEB, Ch. J., and BOSWORTH, HOFFMAN, and WOODRUFF, J.J.)

Heard, Oct. 31; decided, Nov. 14, 1857.

THIS is an appeal, by the defendant Joyce, from an order denying a motion, made by him (after trial and judgment), to open the case so far as to permit him to make proof of a claim which he omitted to prove at the trial.

The nature of the controversy, and the facts and circumstances under which the order, appealed from, was made, are fully stated, in the opinion of the Court.

Andrew Benedict, for certain defendants who had established their claims on the trial.

John E. Burrill, for other defendants.

D. D. Field, for defendant Joyce (appellant.)

BY THE COURT. WOODRUFF, J.—The appellant, Joyce, one of the defendants herein, having a claim for work and materials done and furnished towards the erection of a building in the city of New York, against the person who contracted to erect such building for the owner, on the 3d of October, 1851, took the steps prescribed by statute to create a lien upon the building, and afterwards instituted the proceedings (also prescribed by statute) in the Court of Common Pleas, to bring such lien to a close, and issue was joined in such proceedings prior to October, 1852. Before the issue was brought to trial, the building itself was sold under a judgment or decree for the payment of some prior claim: And the owner of the building being at the same time pursued in this Court by the contractor, upon his original contract, this action (in the nature of a cross action,) was commenced by the owner in February, 1854, for the purpose of determining to whom the surplus of the proceeds rightfully belonged, and to settle the conflicting claims of such original owner of the building, the contractor, and the defendant Joyce, and other defendants, who also claimed to have liens under the statute, and out of such surplus proceeds the amount remaining due to the

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original contractor, was brought into this Court. An injunction originally granted to restrain the defendant, Joyce, (the present appellant) from proceeding further in his proceedings to foreclose his lien, was in November, 1855, so modified as to permit the appellant to proceed with the trial of the issue joined in his proceeding to foreclose.

The appellant being, as he states, desirous of avoiding a double litigation, omitted to proceed with his action in the Court of Common Pleas, and awaited the trial herein. In November, 1856, this action came on for trial, in the Special Term. On the trial the counsel for the appellant—under the conviction that it was sufficient for the protection of his client to show that he had taken the requisite steps, under the statute, to create a lien, and that his proceedings for the foreclosure were still pending, and supposing that the Court of Common Pleas alone had jurisdiction to determine whether such lien was a valid, binding lien, and settle the amount thereof—gave no proof of his claim other than the condition and pendency of the proceedings in the Court of Common Pleas.

The Court held, that such evidence was not sufficient to entitle him to participate in the fund in this Court then to be distributed, and gave judgment directing the distribution of the fund among the other claimants, and excluded the appellant from any share thereof.

At what time this decision and judgment thereon were given does not appear by the papers before us, nor when the appellant first had notice thereof; but in April thereafter the appellant applied by petition and affidavits to the Special Term, and moved thereon that the case be so far opened that he be permitted to prove the existence of his lien, and the amount of his claim, and establish thereby his title to participate in the fund in question, with such priority as might appear by the evidence to be just and legal.

This motion could only have been properly urged upon the ground of surprise or excusable neglect, since if the appellant wished to insist that there was error in the decision or judgment, he should, upon due exception, have appealed therefrom.

The motion was denied, and he now appeals from the order denying that motion.

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In substance and effect, this was a denial of a motion for a new trial of the claim of the appellant. We think that the order was therefore an appealable order, under the Code, as amended in 1851. § 349, sub. 2.

By § 174 of the Code, power is given to the Court, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, to relieve a party from a judgment, order, or other proceedings taken against him through his mistake, inadvertence, surprise, or excusable neglect.

There is, therefore, no want of power in the Court to grant to the appellant the relief sought by his motion.

We are not willing to sanction the idea, that under any ordinary circumstances, the mere mistake of counsel in regard to the law of his case will entitle a party to relief, when he discovers what is pronounced to be the law by the decision of the Court.

But on the other hand, there may be a case so novel and peculiar in its nature, in which it is so palpable that actual injustice may, and probably has been done, and where there are no other means of relief, that the Court will feel bound to relieve the party from the consequence of the inadvertence, and mistake of his counsel, although it arose from a misapprehension of the law or rules of practice, if that can be done without prejudice to the rights of the other parties; by which is meant, without any loss to them, other than such as may necessarily result from establishing what may be shown to be the rights of the party applying.

It is not without some hesitation that we have been brought to the conclusion that the present is such a case; and a conviction, that the ends of justice demand that the defendant should be relieved, and that such relief may be given without any injustice to others, leads us to say that the motion should be granted upon proper terms.

The judgment has not been executed, and therefore, if the other parties are not subjected to any further costs, they will not be prejudiced otherwise than by the brief delay which may be caused by the further enquiry sought.

The Statute under which the appellant was proceeding, is of recent enactment. Of the proceeding itself, to foreclose the lien prescribed by the Statute, this Court clearly had no jurisdiction.

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The Statute has pointed out the mode of bringing the party against whose property the lien was asserted to an accounting and settlement, and authorizes a judgment directing a sale of the right, title, and interest of the owner, for the payment of the amount, for which, on such accounting, a lien should be established.

But that proceeding under the Statute must be brought in a Justices' Court, or the Court of Common Pleas; this Court has no jurisdiction thereof. When the property to be affected by such a proceeding was sold by the judgment of this Court, and was withdrawn from the reach of the appellant, by any judgment or decree in his proceeding in the Common Pleas, and the controversy thereafter was to be concerning the balance due from the owner to the original contractor, which had been brought here under the order of this Court in the cross action, and which was claimed to be due to the lien holders, as a substitute for the property itself; it is obvious that novel and interesting questions—chiefly questions relating to the practice of the Court, and mode of investigating and settling the claims of the parties—at once arose—and whether this Court would direct issues to try the claims, or direct an accounting and settlement to be had before the Court, or whether they must regard the Court of Common Pleas as having exclusive jurisdiction to determine the existence and amount of the Statute liens, were also questions which were new, and, in relation thereto, counsel were without the aid of any adjudication or precedent.

Again, the property having been sold, it is now obvious that if the appellant be not permitted to participate in the fund now in this Court, he is remediless. There is no property upon which a judgment, in the Common Pleas, establishing his lien, can operate; and therefore, if this motion be denied, his loss is inevitable, if he indeed, have the lien which is asserted. And this he must lose, not because his claim has been investigated, and on investigation, been held invalid, but because his counsel, under the circumstances above suggested, has misconceived the mode in which that claim should be supported, or through misapprehension has failed to support it at all.

This result can be avoided without any injury or danger of wrong to the other parties. No further investigation of the

claims of those whose liens are established by the former trial is necessary.

The appellant does not seek to controvert those claims. The question of priority, alone can affect the other defendants at all, and as to that question, it will be no injustice to them to permit the appellant, if he establish his claim, to stand where the priority to which he may be justly entitled, will place him.

The costs of the further enquiry may be cast upon the appellant as one of the conditions of the relief.

We think that these considerations should induce us to grant the appellant the privilege sought by his motion, unless such laches are imputable to him, by reason of the lapse of time, as should bar his appeal to our discretion.

Without impairing the value or force of the rule which requires, that motions of this description should be made without unnecessary delay, and that the party should be diligent and active in the protection of his rights, we may yet say, that where the delay has not placed the opposing party in any worse condition, or deprived him of any advantage which he ought in justice to have or keep; it is harsh to refuse what we think otherwise just on that mere ground, and we may properly allow an excuse which otherwise would be very clearly insufficient.

In this case the first alleged delay is the failure to prosecute his proceeding in the Common Pleas, after the injunction was removed. In relation to that, what has already been suggested, of the mistake or inadvertence of counsel, may be regarded as rendering the neglect excusable within the meaning and spirit of the provision of the Code already referred to.

The other supposed want of diligence consists in not making his motion at an earlier day. The motion papers do not show when the decision adverse to the appellant was made, and judgment entered. The points of the counsel, for the respondents, state, that judgment was entered in January, 1857. The motion papers were, in part, prepared in March, and the petition was served in April. At what time prior to this the appellant had notice of the judgment, does not appear.

We do not suppose that the Legislature, in limiting the time within which the Court might relieve, to one year from notice of the judgment, intended that in all cases an application within

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one year should be deemed in due season, when, upon the whole case, the delay seemed unreasonable and prejudicial to the adverse party. But we nevertheless regard it as furnishing some guide when mere delay is objected to what would be otherwise just, and when the delay itself has been in no wise prejudicial.

Upon the whole case, the circumstances seem to us to require that the motion should be granted. But upon terms which we think will fully secure the respondents against any loss or injustice from the order to be made.

The appellant must pay the costs of the motion at Special Term.

He must execute to the respondents an undertaking with at least one resident surety, in \$250, for the payment of all the costs of the inquiry which is opened.

He must consent to a reference, or to a trial before the Court, as the respondents may elect, waiving all claim that the lien should be tried and determined in the Court of Common Pleas, and enter into a stipulation to that effect.

He is not to question the amount of the claims of the other parties, nor open any question that is settled by the adjudication already made, except only the amount of his own claim, and its priority in relation to the other parties.

Upon these terms, the judgment may be so far opened as to permit the appellant to establish, if he be able, that he has a lien, the amount thereof, and the order of priority which it equitably or legally has, as between all the parties, and that such modification of the judgment already entered may be made, or such new judgment may be thereupon entered, as to the Court at Special Term may seem just.

Ordered accordingly.

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SETH C. KEYES v. WILLIAM MOULTRIE and THOMAS PALMER.

When an action, in form, against two persons jointly liable, is commenced by a service of the summons on one defendant alone, and a notice of appearance, by the latter as attorney for both, is served, and he puts in an answer for himself only, and a trial is had on the merits, and a judgment dismissing the complaint is rendered; and on proof, that notice of appearance for both defendants was served by mistake and without authority, a motion is made to have the judgment, which has been entered, recite that the defendant not served did not appear in the action, although such relief may be granted, it is error to vacate the judgment, and all proceedings had subsequent to the day preceding the trial, and to grant a new trial to the plaintiff.

When a judgment for such a cause, is thus modified in its recitals, a plaintiff who has relied on such notice of appearance, as authorized and valid, should be relieved from all proceedings had on the faith thereof, which would be valid if such notice was authorized, but which are invalid, or may be avoided, if it was unauthorized, and from such proceedings only.

When the action has been tried on its merits, as if both defendants had appeared, if no error was committed at the trial, the plaintiff should not have a new trial, merely because the unauthorized notice is allowed to be corrected, and the recitals in the judgment made to state the truth in that behalf. If error was committed at the trial, the judgment would be reversed on the plaintiff's appeal, as well with the recital of the non-appearance of Palmer in it, as if it recited the fact of his actual appearance.

(Before DUKE, Ch. J., BOSWORTH, HOFFMAN, SLOSSON, and WOODRUFF, J.J.)

Heard, Nov. 21; decided, Nov. 28, 1857.

THIS action comes before the Court at General Term, on an appeal by the defendant Moultrie, from an order made by Mr. Justice HOFFMAN on the 24th of October, 1857.

The complaint states as a cause of action, that the defendants made their joint note, payable to their own order fifteen days from the 6th of October, 1856, for \$1,000, and endorsed and delivered it to the plaintiff, and that they have paid only \$800 on account of it. That, to secure the residue, the defendants agreed that Moultrie should execute his bond for \$1,000, and a mortgage of a house and lot belonging to him, to secure the same, and deliver the said bond and mortgage to the plaintiff; that the latter should thereupon advance to the defendants \$500 in cash, and they should give their joint note to him for \$2,000.

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That the plaintiff having an opportunity, as he supposed, to negotiate said bond and mortgage, requested that they should be drawn, payable to Palmer as obligee and mortgagee, and that he should assign them to the purchaser thereof. That they were, thereupon, so drawn and delivered to the plaintiff, both defendants agreeing that Palmer should assign them to such person as should purchase them, and the plaintiff thereupon, on the 3d of January, 1857, paid to the defendants \$300, on account of said \$500.

That being unable to negotiate the said bond and mortgage, the plaintiff returned them to Moultrie about the 27th of January, 1857, requesting new ones to be drawn directly to himself, which Moultrie promised to do. On the 31st of said January, the plaintiff demanded of the defendants the bond and mortgage, and their note for \$200, and tendered \$200 cash (residue of the \$500), and they promised to send to him the new bond and mortgage, and their note for \$200, and take the \$200 in money and the old note of \$1,000. That, on the 31st of January, Moultrie wrote to the plaintiff that he had changed his mind, and refusing to deliver the said bond and mortgage. It demands judgment that the defendants pay the plaintiff the amount due him as aforesaid, and that Moultrie execute and deliver to the plaintiff the bond and mortgage agreed on, and that the defendant Moultrie be in the meantime enjoined from disposing of or encumbering said house and lot, etc. This action was commenced in February, 1857.

Moultrie, being an attorney, served notice of appearance, as attorney for himself and Palmer. Palmer was not served with the summons. Moultrie put in an answer for himself alone. The action was tried before Mr. Justice HOFFMAN, June, 1857, without a jury, and he gave judgment, dismissing the complaint.

The plaintiff made a case, and appealed from the judgment to the General Term. The judgment, as entered, did not show that Palmer had appeared in the action. The Judge amended it, on an *ex parte* application, so that it stated such to be the fact. Thereupon the defendant Moultrie moved before the same Judge, (on affidavits showing that his clerk, who drew the notice of appearance which was served, by mistake and without authority, and without Moultrie being authorized to appear for Palmer,

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drew it as an appearance for both defendants, and on other papers,) that the recital in the judgment, that Palmer had appeared in the action be stricken therefrom. The said Justice, on the 24th of October, 1857, after hearing both parties on such motion, made an order that such recital be stricken out, and "that upon a withdrawal of the appeal; all proceedings herein, from the day prior to the commencement of the trial hereof to the present time, be vacated and set aside, and that the cause stand as if no trial had been had, and that the injunction be restored as heretofore, and continued in force till the further order of the Court, and that the plaintiff take such steps to bring in the defendant Palmer as he may be advised."

It is from this order that the present appeal has been taken by the defendant Moultrie.

William Moultrie, in person, appellant.

D. D. Field, for respondent.

BY THE COURT. BOSWORTH, J.—In this action the plaintiff could recover against both defendants upon the note, although he might fail to establish a right to have a bond and mortgage executed and delivered to him, as prayed for by the complaint. (*Marquat v. Marquat*, 2 Kern. 336.)

He could not, on the default of Palmer to answer, take a several judgment against him for the amount due on the note, and then proceed and litigate with Moultrie the right to recover a judgment for the same debt against him.

A several judgment against one of several defendants, before a trial of the action against the others, is only proper when, according to the cause of action stated in the complaint, the liability of the defendants is several. (Code, § 136, suba. 2 and 3.)

The plaintiff having received a notice of the appearance of the defendant Palmer, it was unnecessary to serve the summons on him. (Code, § 139; Rule 7 of the Supreme Court; *Mahaney v. Penman*, 4 Duer, 605, and note to p. 606.)

Moultrie, by whom the notice of appearance as attorney for Palmer, as well as for himself, was given, cannot complain that the plaintiff relied and acted upon it as an authorized notice, nor to his being relieved from any proceedings that have been

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taken in consequence of it, and which have become *nugatory*, by reason of Moultrie's being allowed to correct his notice so as to convert it into a notice of appearance for himself alone, and to have other subsequent proceedings amended, so as to show by the record that Palmer has not been served with the summons nor appeared on the action.

If all the allegations of the complaint are true, the plaintiff has a right to have the bond and mortgage, which were executed, assigned to him by Palmer, or, in lieu of it, a bond and mortgage executed directly to him by Moultrie, and the joint note of the two for \$200, or a judgment against both for \$1,000, if the \$200 tendered by the plaintiff shall not be required to be paid or advanced by him to the defendants.

Viewing the defendants as alleged joint debtors, although the plaintiff might proceed upon a service made on one only, and take such a judgment as is authorized by the Code (§ 136, sub. 1), yet he is not obliged to do so. He has the right, by suing all the defendants, to have the whole litigation determined by a single trial.

And when he has been misled, by the service upon him of a notice of appearance of the defendant not served, and that notice has been given by the defendant who was served, as attorney for the other defendant, the one giving the notice cannot complain that the plaintiff is relieved from proceedings had on the faith that the notice so given was authorized and legal, and which would be valid if such notice was authorized, but are invalid, or may be avoided, if it was unauthorized.

But, the fact that Moultrie had no right to give the notice, does not entitle the plaintiff to any relief, except from proceedings which have become *nugatory* merely because such notice was unauthorized. As the plaintiff was defeated on the merits, no other results have occurred than would have happened, if the notice had been authorized and still appeared of record as a subsisting and valid proceeding.

If the plaintiff, on the proofs made, was entitled to a judgment against both defendants, either for the money lent, or for any part of it, or to the further judgment that Moultrie execute the bond and mortgage, or to the latter relief, and to that only, the judgment was erroneous :

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If it is not erroneous he should not be relieved from the judgment, and be allowed a new trial, except for cause and on terms. He has had a trial on the merits, and the decision on that could not be affected by the fact, that Palmer had, or had not appeared. The trial proceeded as if he had appeared—and upon all the evidence given, the Court decided, that the plaintiff was not entitled to any relief.

If there was no error in that decision, the judgment would be affirmed on appeal. But although free from error, and although it would be affirmed on appeal, the order of the 24th of October, 1857, allows the plaintiff to abandon his appeal, and have a new trial, without payment of the costs of the trial or of the appeal.

This has been allowed, as far as we can see, because Moultrie served notice, by mistake of his clerk, that he appeared for Palmer. This fact could not have varied the legal effect of the evidence given on the trial.

Nor can we see that the plaintiff can lose, or be deprived of the right to have the judgment reversed on any ground which would be error, if such notice had been authorized; by reason of an amendment of the record, so that it will show that Palmer was neither served with the summons nor appeared in the action.

So if the judgment shall be held to be erroneous, and a new trial shall be granted, the plaintiff can serve Palmer with the summons, before proceeding to trial, and obtain a personal judgment against him, as well as against Moultrie.

If no error was committed for which the judgment should be reversed, there should not be a new trial.

All of the order subsequent to that part of it which directs, "that the said recital in the amended judgments be stricken out," is erroneous and must be reversed. An order to that effect will be entered.

Bedell v. Sturta.

BEDELL v. STURTA.

An order of arrest will not be vacated, on a motion made after the defendant has answered; on the mere ground that, the summons is erroneously entitled, especially when that defect is not specified in the notice, as a ground of the motion. When the cause of action is one, which, of itself, gives the plaintiff a right to an order of arrest, the order will not be vacated, because the moving affidavits deny the existence of the cause of action.

(At Special Term, December 3, 1857, BOSWORTH, J.)

THE defendant moves to vacate an order of arrest, by virtue of which he is now held in custody. It was granted on the 10th of October, 1857. An amended answer to the complaint was put in, on the 12th of December. The original summons is entitled in the Supreme Court. The copy served is not produced, and how that was entitled does not appear. The notice of motion does not point out this irregularity.

BOSWORTH, J.—As the cause of action is one which would authorize an execution against the body, in case of a recovery, the order will not be vacated merely because the cause of action is denied. The opposing affidavits sustain that on which the order was granted. The complaint will not be set aside after an answer put in, merely because the summons was irregular. If the order of arrest is not wholly void, it should not be set aside for such irregularity, on a motion made after answer; if wholly void, the defendant does not need the interposition of the Court. Motion denied, with seven dollars costs to plaintiff, to abide the event. See *Union Bank v. Mott*, 6 Abb. P. R. 315, and the cases cited, in a note to it.

Murray v. Hendrickson.

MURRAY v. HENDRICKSON.

An assignee, under a general assignment, by a debtor, of his property in trust for his creditors, although a trustee of an express trust, must prosecute as such, in order to be exempted from payment of the costs of the action, if he fail to recover.

When he sues in his own right, and is defeated, he must pay costs, if the action be one in which, a plaintiff, failing to recover, pays costs as a matter of course.

(At Special Term, December 3, 1857, BOSWORTH, J.)

THE plaintiff now moves to set aside the judgment entered, against him, for the costs of this action, and an execution issued on such judgment, as irregular: The complaint states the plaintiff to be endorsee and owner of a note for \$400, made by defendant, and prays judgment for the \$400 and interest. In November, 1854, judgment was entered for defendant for costs. Plaintiff, on an affidavit to the effect, that the note was transferred to him by an assignment made by Currie for the benefit of his creditors, moves to set aside the judgment and execution, on the ground that, being trustee of an express trust, he could not be charged personally with the costs of the action, except for mismanagement or bad faith in the action, to be determined by special order of the Court, and that no such order has been made.

BOSWORTH, J.—As the plaintiff sued in his own right, without alluding, in his complaint, to his representative character, § 817 of the Code, does not apply.

To become entitled to the immunities, provided by that section, he must present a case falling within it, and come before the Court in a character which it protects, and seek to recover in that character. (9 Wend. 486.) Motion denied, with \$7 costs.

The East River Bank v. Cutting and Caldwell.

THE EAST RIVER BANK v. CUTTING and CALDWELL.

When two persons are named as defendants in a summons and complaint, and only one is served, and judgment is thereupon perfected against him, there is, then, no action pending against the other, until he is served with the summons.

If he is served with it, after judgment against the other, and intermediate those periods, the title to the cause of action becomes vested in a third person, the latter cannot, under § 121 of the Code, be substituted, as plaintiff in the action against the defendant last served.

(At Special Term, December 3, 1857. BOSWORTH, J.)

THE defendants are sued as maker and endorser of a note; Cutting, the maker, was served with the summons in July last, and judgment entered against him, on failure to answer. On the 10th of October, the operations of the plaintiff were suspended by the appointment of David Banks as a Receiver. Caldwell was severed with the summons on the 12th of November. It is now moved that the Receiver be made plaintiff in the action, by substitution, which the defendant opposes.

BOSWORTH, J.—There has been no transfer of interest pending the action. By taking judgment against Cutting, the action was severed, and as to Cutting, determined by the judgment. There was, then, no action pending as against Caldwell. It could only be commenced by the service of the summons upon him. Before it was so commenced the cause of action was transferred to the Receiver. The motion cannot be granted under § 121 of the Code. If the action could be brought in the name of the present plaintiff, by serving the summons on Caldwell, when service of it was made on him, a recovery can be had in the name of the present plaintiff. If it could not, then, granting the motion, would be substituting, after issue joined, a person, as plaintiff, who had a right to sue, for one who had no right to sue. Motion denied; with \$7 costs to abide event.

CHARLES BURRALL v. JACOB VANDERBILT and THEODORE R. B. DE GROOT.

When several defendants, against whom a judgment has been recovered, unite in an appeal, from it, to the General Term, and third persons execute, as sureties, an undertaking on such appeal, in the terms prescribed by section 385 of the Code, such sureties are not discharged from liability, merely because some of such appellants abandon their appeal, if the respondent obtains an affirmance of such judgment.

Neither are such sureties discharged, because an order is made on the consent of the respondent's attorney, without their consent, or notice to them, that the Clerk enter on the docket of such judgment, the words, "secured on appeal," and such entry is, thereupon, made.

The facts that, after suit is brought on such an undertaking, the judgment of affirmance is appealed from to the Court of Appeals, and such an undertaking is given as is required, to stay proceedings, in the Court below, on such judgment, cannot be plead in bar, or in abatement of the action, on such undertaking.

(Before *HOFFMAN* and *PIERREPONT*, J.J.)

Heard, January 12; decided, February 6, 1858.

THIS action comes before the Court, at General Term, on an appeal by the defendants, from a judgment rendered against them, on the trial of the action, by the Court, without a jury.

The plaintiff having, on the 4th of April, 1855, recovered a judgment, in this Court, for \$1158·90, against Garret Van Cleve, Joseph Carpenter, George R. Jacques, and William H. De Groot; the four persons, last named, on the 17th of April, 1855, appealed from that judgment to the General Term, and the defendants in the present action, executed an undertaking, as sureties for such appellants.

By such undertaking, the said Jacob Vanderbilt and Theodore R. B. De Groot, did "undertake, that the said appellants will pay all the costs and damages which may be awarded against them on said appeal, not exceeding two hundred and fifty dollars; and do also undertake, that if the said judgment so appealed from, or any part thereof, be affirmed, the said appellants will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment

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shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellants on the said appeal."

The present action is brought on that undertaking. The complaint alleges the recovery of the judgment of the 4th of April, 1855, the taking of an appeal from it, the giving of the undertaking in question, the affirmance of the judgment appealed from, with \$83 costs of the appeal, recoverable from the appellant, Wm. H. De Groot, the filing of a judgment roll containing the judgment of affirmance, and non-payment of the judgment so affirmed, or of the costs of said appeal, or of any part thereof, and prays judgment for the amount thereof, with interest.

The defences set up in the answer, are, 1st, that there has not been "any judgment against said defendants jointly, of affirmance of the judgment appealed from."

2. That when said appeal was taken, the judgment appealed from was a lien, on real estate of William H. De Groot, of sufficient value to pay it. After the defendants executed such undertaking, as such sureties, the plaintiff without their consent, or notice to them, permitted said De Groot to have entered, upon the docket of said judgment, the words, "secured on appeal," whereby he was enabled to, and did convey all his real estate, and they, thereby, lost, and were deprived of their subrogatory right of indemnity, against said property.

3. That said De Groot has appealed from said judgment to the Court of Appeals, and perfected his appeal, whereby the right to demand the amount thereof, is suspended until the determination of the said appeal.

This action was tried in March, 1857, before MR. JUSTICE WOODRUFF, without a jury.

The plaintiff's counsel read, in evidence, a stipulation in the action, signed by the defendants' attorneys, which, exclusive of its title, and the signatures to it, is in these words, viz.

"It is admitted that a judgment was rendered at special term of this Court, on the 4th of April, 1855, for \$1,153 90 cents, against William H. De Groot and others, and that an appeal therefrom to the General Term was taken by the defendants therein, and that on such appeal, the defendants in this action executed and delivered the undertaking in the complaint men-

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tioned, and on which this action is brought. That the appeal was abandoned by all the appellants, except De Groot, who prosecuted the appeal, and on the appeal, the judgment of the Special Term was affirmed by the General Term on the 23rd day of February, 1856, and judgment of affirmance with costs which were adjusted at Eighty-three Dollars, was on the 28th day of February, 1856, entered with the Clerk of this Court, and the judgment roll filed with him. That notice of the entry of such judgment of affirmance was served upon the defendants in this action, and demand of payment thereof made before this action was commenced. That this action was commenced by service of summons and complaint, on the 26th day of April, 1856."

The plaintiff then rested.

The defendants' counsel thereupon read in evidence a stipulation signed by the plaintiff's counsel, which, exclusive of its title, and the signatures to it, is in these words, viz. :—

"The plaintiff stipulates to admit on the trial of this cause, that William H. De Groot appealed to the Court of Appeals from the judgment mentioned in the complaint in this cause, and perfected such appeal on the 9th day of June, 1856, and filed security to effect a stay of proceedings upon such judgment."

It was also admitted, that the appeal therein mentioned is still pending, and that the answer in this action was served simultaneously with the notice of said appeal, on the 9th day of June, 1856.

Said counsel also put in evidence from the records of this Court, produced by the Clerk, the following consent filed November 10, 1855, and order made by Mr. Justice Slosson, one of the Justices of this Court thereupon.

It was admitted by defendants' counsel that the consent was all in the hand-writing of S. Sanxay, the attorney for De Groot, and that the order was entered by the counsel of De Groot, and that no copy of said order was served upon the plaintiff's attorneys. Such consent and order, exclusive of their titles, read thus :—

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"Whereas, judgment was rendered on the 4th day of April, 1855, in the above named Court, in favor of the above named respondent, for the sum of \$1,153 90 cts., the same having been secured on appeal; it is hereby mutually agreed that an entry be made by the Clerk of this Court, on the docket of said judgment, that the same is secured on appeal," and that an order to that effect be granted.

"November 7, 1855.

"S. SANXAY,
Attorney for De Groot.

BURRILL, DAVISON & BURRILL,
Attorneys for Plaintiff."

(ORDER OF NOV. 10, 1855.)

"On reading and filing the consent on the part of the respective parties in this action, whereby it appears that the judgment for \$1,153 90, recovered in this cause on the 4th day of April, 1855, has been secured on appeal, and on motion of C. N. Potter, of Counsel for the said defendant, De Groot; it is ordered that the docket of the judgment in this cause, and the docket of the transcript thereof in the office of the clerk of the City and County of New York, be on presentation of a certified copy of this order, marked 'secured on appeal' as by the statute provided."

The judge before whom the action was tried, gave judgment for the plaintiff, and his statement of the facts found by him, and of his conclusion of law thereon, is as follows:—

"The facts as established by the evidence are—

"First. The same as are stated in the stipulation signed by the defendants' attorneys, hereinbefore set forth; and also those stated in the stipulation read by the defendants' counsel.

"Second. That on the 9th June, 1856, an appeal was taken by William H. De Groot from the said judgment of affirmance to the Court of Appeals, by the service of a notice of appeal and the giving the requisite security for a stay of proceedings upon the judgment appealed from, and that such notice of appeal was served simultaneously with the answer in this action,

"Third. That the attorney for the plaintiff, at the request of William H. De Groot, signed the consent, on which the order of the 10th November, 1855, was granted, and that such order was procured from one of the Justices of this Court, without any notice to or intelligence on the part of the plaintiff or his attorney, but on the application of the said De Groot and his counsel.

Fourth. That the docket of the original judgment in favor of the plaintiff against said De Groot, was marked "secured on appeal," and thereupon said De Groot conveyed a part of his real estate, which had theretofore been bound by the lien of said judgment, and on the 4th December, 1855, made a general assignment of all his real and personal property to trustees, for the benefit of his creditors. That on the 28d February, 1856, the docket of said judgment in the office of the Clerk of this Court, and of the Clerk of the city and county of New York, were marked thus, "Judgment affirmed, see Docket 28, February, 1856."

Fifth. That there is due to the plaintiff, on the cause of action stated in his complaint, the sum of \$1,403 39, for which sum, with his costs, he is entitled to judgment.

The defendants duly excepted to the Court's conclusion of law. At the trial they moved a dismissal of the complaint, on the grounds on which they insisted, on the appeal, the judgment should be reversed, and excepted to the decision, denying such motion.

Judgment having been entered on the decision of the Judge, the defendants appealed from it to the General Term.

S. Sanxay, for defendants and appellants, insisted that each of the grounds of defence set up in their answer, was proved, and that each ground of defence is fatal to the plaintiff's right to recover.

J. E. Burrill, for plaintiff and respondent.

BY THE COURT. PIERREPONT, J.—The counsel for the defendants claims that, because some of the original defendants abandoned the appeal, that the condition of the undertaking has not been broken.

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Section 282 of the Code provides, that "whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected as provided in the Code, the Court in which such judgment was recovered may, on special motion, after notice to the person owning the judgment, in such terms as they shall see fit, direct an entry to be made by the clerk on the docket of such judgment, that the same is 'secured on appeal,' and thereupon it shall cease, during the pending of the appeal, to be a lien on the real property of the judgment-debtor, as against purchasers and mortgagees in good faith."

If the condition of the undertaking is not broken for the reason that a part of the original defendants abandoned the appeal before judgment was affirmed, then all, save one, might abandon the appeal after the real estate of the judgment-debtor had been released, in the manner provided by the Code, and thus the Legislature would have contrived an ingenious method by which a judgment-debtor might clear his real estate of the lien of the judgment, sell the estate, and his sureties be released from all liability.

We think this objection is not well taken.*

The second objection is, that the plaintiff permitted the judgment debtor to have entered on the docket, the words "secured on an appeal," without notice to the sureties.

The entry was made in obedience to an order of the Judge, granted upon application of the attorney of the defendant De Groot, he having obtained the consent of the plaintiff's attorney that such order be made; neither the plaintiff nor the sureties having had any knowledge of the consent.

The statute does not require notice to the sureties; it only requires notice to the person "owning the judgment." (*Livingston v. Roberts*, 3 Abb. Pr. R. 231.)

* Although all of the appellants, except one, abandoned their appeal, yet it is not found that, as to them, the appeal was dismissed or discontinued. On the contrary, it is found that the judgment appealed from was affirmed: It may, perhaps, be said, and justly so, that it was affirmed as to all the defendants, and that the judgment of affirmance is in the same form, and of the same effect, as if all the appellants had sought, on the argument of the appeal, a reversal of the judgment: And that this branch of the attempted defence is, therefore, disproved.—RMR.

When sureties join in an undertaking, they are presumed to know the legal effects of their act, and that one of those effects will probably be to release the real estate of the debtor from the lien of the judgment. In most cases that is one of the very objects for which the undertaking is executed.

We do not see that the plaintiff has done anything, in respect to the order, of which the defendant can reasonably complain.

The defendants' next objection is, that the judgment-debtor has appealed to the Court of Appeals from the judgment of this Court, and perfected his appeal.

This action was commenced on the 26th of April, 1856. On the 9th of June following, the defendant put in his answer, and at the same time served a notice of appeal to the Court of Appeals, from the original judgment, as affirmed by the General Term of this Court.

At the commencement of this suit, then, the plaintiff's cause of action was complete. If the appeal constitutes a defence, it has arisen subsequent to the commencement of the action.

The Code (sec. 839), like the Revised Statutes (2 R. S. 607), declares that a perfected appeal shall stay "all further proceedings in the Court below, upon the judgment appealed from, or the matter embraced therein" (except in certain special cases).

The provisions of the Code in relation to appeals are the same as those of the Revised Statutes relating to appeals from orders and decrees of the Court of Chancery.

In *Burr v. Burr* (10 Paige, 169), the Chancellor held that an appeal, perfected after execution levied, did not stay the sheriff from proceeding on the execution, and terms were imposed as a condition to the order, staying proceedings; affirming the same construction previously given by him in the case of *Clark v. Clark* (7 Paige, 607).

In *Cook v. Dickerson* (1 Duer, 679), this Court held that a perfected appeal, under the Code, did not of itself stay an execution previously levied.

The case before us is not "a proceeding in the Court below upon the judgment." The suit upon the undertaking might have been brought in any Court of competent jurisdiction, as well as in the Court where the judgment had been rendered. The case of *Thompson v. Blanchard* (2 Comst. 561) differs widely

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from the one now under consideration, both in its facts and the principles involved.

The only question which this appeal brings before us is one of law; and we find no error in the decision of the Judge. We must, therefore, affirm the judgment, leaving the defendant to move for a stay of proceedings, or to make such other application to the Court, as he may be advised.

Judgment affirmed, with costs.

CONSIDERANT *v.* BRISBANE.

When a Special Term order, which overrules a demurrer to the amended complaint, is, on appeal, reversed, and judgment is ordered in favor of the defendant, but leave is given, to the plaintiff, to amend his complaint, on paying the costs of the demurrer at Special Term, to be taxed, the defendant is entitled to a charge of \$10, for proceedings before notice of trial, and a like charge, for proceedings after notice and before trial, although the same sum has been once paid, for the latter class of services, on sustaining a demurrer to the original complaint.

(At Special Term, March 19, 1858, Bosworth, J.)

EACH party moves to correct the clerk's adjustment of costs.

The General Term reversed an order overruling a demurrer to the amended complaint, and gave judgment for the defendant, with liberty to the plaintiff to amend his complaint, on paying costs of the demurrer at Special Term to be taxed, and \$10 costs of appeal: The clerk, in taxing the costs, allowed \$10; costs of proceedings after notice of, and before trial, and disallowed a charge of \$10, for proceedings before notice of trial, because the same item had been taxed, and paid by the plaintiff, on sustaining a demurrer to the original complaint. The defendant appeals from the disallowance of the item last named, and the plaintiff from the allowance of that first named.

BOSWORTH, J.—For the labor of examining the amended complaint, and determining the nature of the pleading, to be interposed by way of answer, and of drawing, copying, and serving it, and of other proceedings before notice of trial, it is as just to allow \$10 as for performing similar services, in relation

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to the original complaint. Allowing it, is not paying for the same services twice: The services are, as truly, separate, and different, as if performed in different actions.

For like reasons, the item of \$10, for proceedings subsequent to notice of, and before trial, was properly allowed. As to this item, the taxation is confirmed, and the item of \$10, for proceedings before notice of trial, must also be allowed. The rejection of it was erroneous. A different rule may be applicable when there has been but one actual trial, as in *Perry v. Livingston*, 6 How. Pr. R. 404, and *Jackson v. McBurney*, id. 408:—In the present case, there have been two actual trials, of issues at law, one upon a demurrer to the original complaint, and the other upon a demurrer to an amended complaint. Both items are allowable.

JAMES J. DUIGAN, Plaintiff and Respondent, v. ROBERT HOGAN, Appellant.

The 47th section of the Act relating to summary proceedings by a landlord to recover possession from a tenant holding over after non-payment of rent (2 Rev. Stat. p. 516), is not repealed by the Code.

A Court of Equity, after proceedings have been had, under that act, before a magistrate, for the dispossession of the tenant, and a warrant has been issued, has no power to interfere, by injunction, to prevent the execution of the warrant, on the ground that the tenant has a claim against the landlord for damages for breach of his covenant to repair, exceeding the amount of the rent in arrear.

If the magistrate errs in awarding such warrant, his determination may be reviewed in the manner prescribed by the statute, and if the proceedings be reversed or quashed, the tenant has his remedy by action for the damages caused by the dispossession.

When there is no charge of insolvency of the landlord, the tenant, having a claim for damages, or any cause of action against him, which cannot be used to defeat the proceedings before the magistrate, should pay his rent and prosecute such cause of action, and this will presumptively give him a full remedy, without the interference of a Court of Equity, by injunction, to stay the execution of a warrant of dispossession.

(Before BOSWORTH, HOFFMAN, SLOSSON, WOODRUFF, and PIERREPONT, J.J.)

Heard, May 15; decided, May 29, 1858.

THIS is an appeal by the defendant, from an order at Special Term, granting an injunction.

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The complaint of the plaintiff, fortified by affidavits on his behalf, represented in substance, that the defendant leased certain premises then out of repair, to the plaintiff, and covenanted that he would put them in complete repair—that the defendant neglected and refused to make such repair, and that the plaintiff had sustained great damage thereby, and had been himself put to expenses in making repairs that were necessary—that the making of such repairs was a condition precedent to the defendant's right to claim any rent—that the plaintiff was entitled to apply such expenses on account of the rent, and to be allowed such damages in extinguishment of the rent which had accrued—that the defendant, nevertheless, upon the allegation that the rent for the quarter ending on the 1st of April last, was in arrear and unpaid, had instituted proceedings, under the act authorizing summary proceedings for the dispossession of a tenant holding over after non-payment of rent, before a magistrate, who refused to permit the said matters to be given in evidence, and on the trial gave judgment that the plaintiff be dispossessed, and the defendant threatens to apply for, and the justice threatens to issue, a warrant to put the landlord in possession of the demised premises. The complaint prays that the performance of the covenant to repair be adjudged a condition precedent to the defendant's right to rent or to institute proceedings to dispossess—that the expenses, to which the plaintiff has been subjected, be adjudged payment of the rent, and that he have his judgment for the damages sustained by the defendant's neglect to repair—that the defendant be directed by the judgment to put the premises in repair, etc., and that in the meantime the defendant be restrained by injunction from taking any warrant to dispossess the plaintiff, etc., etc.

The answer of the defendant showed that a warrant for the dispossession of the plaintiff had been actually issued to put the defendant in the possession of the demised premises, and was already in the hands of the constable for execution—that it was issued by the magistrate after a trial by jury in the proceedings instituted by the defendant, and after a full hearing upon the matters in controversy in those proceedings, and a judgment in the defendant's favor therein.

The answer further denied the several allegations in the com-

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plaint upon which the claim of the plaintiff, to be allowed for expenses and damages by reason of the alleged want of repairs, was founded—avers that the defendant performed his agreement by putting the premises in repair according to the terms of the lease, etc. The answer was also corroborated by affidavits annexed, on behalf of the defendant.

Upon an order to show cause, an order was made at special term, that upon condition that the plaintiff deposit the amount of rent in arrear, to abide the event of this action, with a further amount to cover any costs which may be awarded to the defendant, the defendant be enjoined from issuing or serving any warrant to dispossess the plaintiff, or taking any other proceedings to dispossess him of the demised premises.

From this order the defendant appealed to the General Term.

Mr. Nelson Smith, of counsel for (defendant) appellant.

Mr. John W. Ashmead, of counsel for (plaintiff) respondent.

BY THE COURT. WOODRUFF, J.—By the plain terms of the 47th section [now 48th §] of title tenth of chapter 8th of the 8d part of the Revised Statutes, proceedings on an application for the dispossession of a tenant under that title may not be stayed by the writ or order of any Court or officer.

The Legislature in granting the remedy furnished by that title have prescribed with entire precision what allegations must be made on behalf of the landlord, and what issues the tenant shall be permitted to take, and submit to the determination of the jury. If those issues are found by the jury against the tenant, the magistrate is imperatively required to issue his warrant to put the landlord in possession.

It is wholly unnecessary for us to inquire what considerations induced the Legislature to give to landlords this summary mode of obtaining possession of demised premises, or why they have not enlarged the grounds of resistance or defence, which the tenant might interpose to defeat the application. It is enough that it is so enacted, and when the Legislature have given a specific defence, and have allowed no other, it is not for any Court to say that although no fraud has been practised and the

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tenant has had all the benefit of a fair trial which the Statute has provided for him, there are yet other defences, which, had the Legislature permitted him to use them, might or ought to have availed him, and upon such conclusion, to repeal the Statute, and restrain the landlord of his express Statute redress.

And, again, the Statute has prescribed a specific mode of reviewing the proceedings had before the magistrate by *certiorari* to the Supreme Court; but the intention, that the parties should be permitted to act on the presumption that a determination in favor of the landlord is according to the right of the matter, and the purpose to make the proceeding in fact, what it is in name, summary, are shown in the declaration that the proceeding to dispossess, shall not be stayed by such *certiorari*. No allegation of error shall, therefore, prevent the execution of the warrant, even while a review is taking place, which may vacate the whole proceeding.

To this is then added the provision for the recovery of damages by the tenant, by reason of the proceedings, in case they shall be reversed or quashed by the Supreme Court.

And, finally, no writ or order of any Court or officer shall stay or suspend the proceedings thus authorized.

The whole scheme of the Statute is this. Upon certain specified allegations, the landlord may require that the tenant be summarily removed.

The tenant may interpose certain specified grounds of resistance. The issues made between them shall be tried by a jury. Upon a determination in favor of the landlord, he shall be put into possession. And neither by writ of *certiorari* nor by any other writ or order of any Court or officer shall the proceedings be stayed.

The proceedings may, nevertheless, be reviewed in a manner prescribed, and if reversed or quashed, the tenant shall be entitled to recover his damages sustained by the proceedings, with costs.

Here is a complete system or scheme which the Legislature thought wise in policy, just in its operation, and, if in any case harsh in its effect, still a lesser evil than to permit landlords to be kept out of possession during any protracted litigation into which the tenants might find means to involve them.

Although it was not claimed on the argument that this Court

may in the face of this Statute, and contrary to the provisions of the 47th section, enjoin the landlord who has succeeded on the trial before the magistrate, and obtained a warrant directing the officer to put him in possession of the demised premises, it is claimed that this Statute is modified, and this 47th section is in substance repealed by the liberal provisions of the Code which confer upon the Courts the power to grant injunctions; and section 219 of the Code is referred to as producing this change.

Section 471 of the Code provides that the second part of that act, in which the 219th section is found, shall not affect any proceedings under certain specified chapters and titles of the Revised Statutes, of which chapter 8th of the third part is one; except that where any particular provisions of those chapters and titles are plainly inconsistent with the Code, such provision shall be deemed repealed.

It is, therefore, obvious, that unless section 219 is plainly inconsistent with the section 47 of the Revised Statutes above referred to, then that section is in full force, and we have no power to enjoin the landlord in the present case.

The section of the Code referred to (219) relates solely to temporary injunctions, or injunctions *pendente lite*, and the very first condition, upon which the Court is permitted to grant a temporary injunction, is, that it shall appear by the complaint that the plaintiff is entitled to the relief demanded; i. e. if the Court can see that if the plaintiff finally establishes the facts which he alleges, he will be entitled to the relief demanded, and such relief consists in whole or in part in restraining some act which would produce injury to the plaintiff, then a temporary injunction may be granted. And it necessarily follows that if we can see that on a final hearing no such injunction can be granted upon the facts alleged, then section 219 does not warrant a temporary injunction.

Whether, if the proofs were now all before the Court, and the plaintiff had proved the facts alleged, a perpetual injunction could issue, is therefore a question which the plaintiff must answer affirmatively, before he can ask anything under section 219, which otherwise has no application whatever to his case.

That section cannot be invoked to show that on a final decree, an injunction may be granted, because it only applies to temporary injunctions.

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And no section of the Code nor any other Statute authorizes any Court on a final hearing to grant a perpetual stay of proceedings after a warrant has been issued, or to suspend the execution of the warrant in such proceedings between a landlord and his tenant holding over without paying his rent, and the § 47, already mentioned, expressly forbids it. A case is not made, therefore, to which § 219 can apply, because it does not appear by the complaint that the facts, if all that is alleged should be proved, will warrant the Court at the final hearing in granting an injunction.

There is, therefore, no inconsistency between § 219 of the Code, and § 47 of the Revised Statutes. The Code provides that when a case is made, upon which, by existing laws, the plaintiff will be entitled to an injunction, he may have an injunction, *pendente lite*. By § 47, the Court are, in substance, forbidden to grant the injunction sought in this case. The necessary consequence is, the case for a temporary injunction contemplated by § 219 is not made out.

We are, therefore, clear that there is no inconsistency between the Code and the provisions of the Statute under consideration, and that the 47th section of the Statute is in full force.

It has seemed advisable to express ourselves distinctly on this point in order that the views of this Court may be understood in the apparent conflict of decision which has been exhibited on this question. (*Smith v. Moffat*, 1 Barb. S. C. R. 65; *Cure v. Crawford*, 5 Howard, 293; 1 Code, R. N. S. 18; *Wordsworth v. Lyon*, Ib. 163; *Valloton v. Seignett*, 2 Abbott, 121; *Hyatt v. Burr*, 8 Howard, 168; *Capet v. Parker*, 3 Sandford, 662.)

These views do not necessarily conflict with the case of *Forrester v. Wilson*, 1 Duer, 624. The power of the Court of Chancery under its peculiar jurisdiction to protect a party against fraud, even when such fraud is attempted under the cover of a statutory proceeding, is not involved in the case now before us. The facts in that case do not appear in the report; but I am informed by my brethren that there the proceedings were taken before a magistrate, at a distance of several miles from the premises. That the utmost despatch was barely sufficient to enable the tenant to reach the place of trial. That although he used all reasonable diligence to arrive in season, and took with him the

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money to pay the rent, and prevent the issuing of the warrant, travelling by the cars, he arrived just as the warrant was signed and delivered, and a moment too late to make the payment. There was deemed sufficient reason for interference on the ground of undue advantage, fraud, or surprise. Here there is no pretence of fraud or surprise. The tenant claimed that he ought not to pay rent because the landlord had broken his covenant to repair, and the tenant was entitled to damages.

Now, this claim was a defence to the summary proceedings, or it was not. If it was, and the magistrate erred in rejecting it, his error may be corrected by a proper review of the proceedings. If it was not a defence, then we can only say that the Legislature have practically said that the landlord shall be permitted to recover possession if the rent is not paid, and a warrant of dis-possession be obtained, notwithstanding such claim for damages, and without being subjected to the delay of a litigation respecting such claim.

Again, if we were at liberty to consider this question under the general rules of equity, it would be obvious to remark, that it is a novel view of the power and duty of a Court of Equity, to suggest that, when the Legislature have said that certain facts shall defeat those summary proceedings, and if they are not established, the landlord shall have possession; yet, a Court of Equity may say, that certain other facts shall avail as a defence and defeat the Statute.

For example, though it be conceded that the Statute does not permit the tenant in this proceeding to set off against the rent a claim due to himself,—a clear legal defence to an action for the rent, but not an extinguishment or payment of the rent—a Court of Equity may say that because the Legislature have not made that a defence, we will; or what is practically sought of us, although the Legislature have, in substance, by not allowing, prohibited the tenant from setting up any such claim as a ground for retaining the possession, we, a Court of Equity, will permit it, and the very prohibition in the Statute shall be the reason for our doing so. As already remarked, if such set off be a defence, and the magistrate errs in rejecting it, the remedy of the tenant is by a review of his proceedings.

Still further, if the subject were open to inquiry upon princi-

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ple, we should say that the plaintiff has ample remedy without the aid of this Court. There is no pretence that the landlord is insolvent. All that the tenant had to do, for the preservation of his rights, was to pay his rent, and if he had any just claim against his landlord, sue him and recover all that is due. There is nothing new in this. Prior to our recent amalgamation of actions and defences, it was a most common occurrence for a defendant to be sued upon a cause of action to which he had no legal defence, although he had also a cause of action against the plaintiff which might be of far greater magnitude. Cross actions were necessary. And a familiar example is suggested, by a case similar to that before us, when it is recollected that a breach of a covenant to keep in repair was no defence to an action of debt for rent. And yet who ever heard of a Court of Equity interfering when there was no defence of insolvency, on the ground, that if a plaintiff was not enjoined he might obtain judgment and execution, and collect his claim before the defendant, in his cross action, could obtain judgment.

In every view of this subject, we think the plaintiff here has mistaken his remedy; he should have paid his rent, and if he have a just claim against the plaintiff, sue, and collect it.

We have deemed it proper thus to express our views respecting the power of the Court in such cases, and the want of any justifiable ground for our interference on the facts stated in the complaint, notwithstanding the present case might, we think, be disposed of on another ground, viz. that the case made by the complaint is fully met by the answer. The whole equity of the bill is denied; all that results from the addition of affidavits to the bill and answer respectively, is that the witnesses differ in their statements as widely as the parties do themselves; and all idea of irreparable injury is already disposed of. If the plaintiff has chosen to lose the opportunity to pay his rent, that is his own neglect. That, and the probable consequence—loss of his term, result, not from any necessity of the case, not from his being unable to prevent irreparable loss, but from his allowing the time and opportunity to pay his rent and save his term, to pass by.

I am authorized to say, that the order appealed from was made in part with a view to save the possession to the tenant

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until this case could be considered on the appeal, which it was understood would be taken to the General Term; and that the Justice by whom the order was made, concurs with all the members of the Court by whom the argument was heard, in holding that the order must be reversed.

Order reversed, with costs on appeal, \$10, and on the motion below, \$10, to abide the event of the suit.

FREDERICK L. PEET v. JOHN WARTH.

When a plaintiff, in an action for the recovery of money, for goods sold and services rendered, recovers a verdict for a less sum than \$50, he must pay the defendant's costs of the action, as a matter of course: Such a plaintiff is not "the prevailing party," within the meaning of those words, as used in § 311 of the Code. The right to recover "the necessary disbursements," is incident to and inseparable from the right to recover the costs of the action: The party who, by law, is entitled to his costs of the action is, in respect to the matter of the costs, the prevailing party.

(Before BOSWORTH, HOFFMAN, SLOSSON, WOODRUFF, and PIERREPONT, J.J.)

Heard, May 15; decided, May 29, 1858.

THE plaintiff brought this action to recover money, for goods sold and for services rendered, claiming over \$50.

The defendant, by his answer, denied that the goods and services were of the value alleged in the complaint. The verdict was for \$30, in favor of the plaintiff.

The defendant claims costs. The plaintiff resists the claim, and demands that the clerk insert in the judgment the amount of plaintiff's disbursements.

The Judge below allowed costs to the defendant, and rejected the plaintiff's claim for disbursements.

The plaintiff appeals from the order entered on that decision.

Miller, Peet, and Nichols, for plaintiff.

S. W. Judson, for defendant.

Peet v. Warth.

BY THE COURT. PIERREPONT, J.—The Legislature, evidently, intended to discourage the bringing of actions, for small claims, in the higher Courts.

By section 804 of the Code, the plaintiff in an action like this is entitled to costs if he recover \$50 or more. By section 805, the defendant in such action is entitled to costs, unless the plaintiff has a right to them. The plaintiff not being entitled to costs, it follows that the defendant is entitled to them. It is also clear that the plaintiff is not entitled to recover his disbursements from the defendant. The right to recover disbursements is incident to the right to recover the costs of the action. They are entered in the bill of costs, and adjusted as a constituent part of it: The plaintiff, having no right to costs, has none to disbursements.

The plaintiff insists that, under the Code, disbursements are to be entered in the judgment in favor of, and that they are recoverable by, the "prevailing party;" and that the party who recovers even a less sum than \$50, has prevailed; and that as the defendant has not recovered a verdict for any sum, he has not prevailed.

In those sections of the Code which relate to costs, "the prevailing party" therein mentioned is he who has prevailed in establishing his right to costs under the law. A plaintiff who sues for and recovers \$20 only, in a Court of Record, is not the prevailing party within the statute relating to costs, and the defendant in such action is the prevailing party.

We have not omitted a careful consideration of the case of *Kalt v. Lignot* (3 Abbott, 33), and the other cases cited by the plaintiff's counsel.

The order appealed from must be affirmed, with \$10 costs.

HEWLETT v. BROWN.

Where a party to an action is made a witness by his adversary, he is as much entitled to witness's fees, as a condition to creating it his duty to attend and be sworn, as any third person.

A six days' notice to appear and be examined, and notifying him that, if he fail to do so, he will be liable as for contempt, and to have his answer stricken out, are not sufficient to authorize an order, (on his default to appear,) striking out his answer, or to punish him for contempt.

(At Chambers, July, 1858. Before BOSWORTH, J.)

THE defendant moves to vacate an order directing his answer to be stricken out; which order was made under the following circumstances:

On the 9th of June, the plaintiff caused a notice to be served on the defendant, requiring him to appear on the 15th, at 10 o'clock, A. M., before J. S. BOSWORTH, a justice of this Court, &c.; and "be examined as a witness, pursuant to the provisions of the Code of Procedure for such purpose."

The notice further stated, "and if you refuse or neglect to attend, you will be liable to be punished as for a contempt of Court, and your answer stricken out; and we shall apply for such relief against you, and for such further and other relief as is provided for by said Code."

The defendant not attending on the 15th, another judge of the Court, on an affidavit of that fact, and of service of the notice, made an order, that "the answer of the defendant herein be stricken out." The defendant now moves to vacate that order. This motion was founded, on the papers before named, and on an affidavit that he was neither summoned nor subpoenaed to attend, and that his fees for attending as a witness were not tendered, and that he told the person serving the notice he should not attend, unless his fees, as a witness, were paid.

BOSWORTH, J.—No witness is obliged to attend Court, or before an officer out of Court, to be examined, unless paid the usual fees allowed by law, (2 R. S. 400, §§ 54, 56.) Sections

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390, 391, 392, and 394, of the Code, enable either party to make the other a witness, and prescribe the means for procuring and compelling his attendance. I think a party, when made a witness by his adversary, is as much entitled to fees, as a condition to creating a duty to attend and be sworn, as any third person.

Under the notice served on the defendant, he could not be punished for a contempt for not attending, unless first brought up on an attachment, or served with an order to show cause,—to the end that he might show, if he could, a sufficient excuse for not attending—such as sickness, or other inability.

The notice does not, in terms, state that a motion would be made on the 15th to strike out the answer, or punish him for a contempt.

When notice of a motion is necessary, it must be served eight days before the time appointed for the hearing. (Code, § 402.) The notice in question was served but six days. The fact, which created the right to have the answer stricken out, if any such fact exists, did not exist when the notice was served, but only occurred on the 15th, the day the order was made. Since its alleged occurrence, the defendant has had no opportunity to be heard in respect to it, except on this motion.

I think the order was irregular, because the defendant was not summoned to attend, and because his fees as a witness were not paid. Whether the answer could have been stricken out, on a motion made for that purpose on due notice, if witness's fees had been paid, although no summons was served, is a question not before me. The proceedings, to punish for a contempt, or strike out an answer, must be based on affidavits, to be served with a notice of motion for an attachment, or to strike out the answer, according as the one relief or the other is sought.

The notice, actually served, did not advise the defendant, that a motion would be made on the 15th to strike out his answer, and if it did, it was too short to enable the plaintiff to then make such a motion.

If I supposed the Judge, who made the order, passed upon these questions, I should deem it my duty to deny the present motion, and leave the defendant to his remedy by an appeal. But I think I may consider, that the length of the service of the notice was overlooked, as a notice of trial and inquest often is,

Gelch v. Barnaby.

although in theory, and generally in practice, a party is required to produce it, and prove due service of it, before an inquest will be permitted to be taken. The motion is granted, but without costs of it to either party. No point was made on the hearing of this motion that the defendant's only remedy, is an appeal from the order he now seeks to vacate.

GELCH v. BARNABY.

A non-resident plaintiff, in an action to recover the possession of personal property, took proceedings in the action, under § 209 of the Code, to procure the property to be delivered to her, and gave to the Sheriff the undertaking prescribed by that section; and thereupon the defendant obtained a return of the property, under § 211.

Held, that the plaintiff might be required to file security for costs, notwithstanding she had already given an undertaking, under and conforming to § 209. Whether the defendant, after obtaining a return of the property, can maintain an action, upon the plaintiff's undertaking,—*quære?*

(At Chambers, July, 1858, before BOSWORTH, J.)

THE defendant moves, that the plaintiff, being a non-resident, be required to file security for costs. The facts are stated in the opinion.

T. W. Barnaby, for the motion.

E. J. Porter, contra.

BOSWORTH, J.—The defendant moves for an order, that the plaintiff file security for costs, on the ground that she has become a resident of New Jersey, since the action was commenced. The motion is opposed on the ground that this action is brought to recover possession of personal property, and that the plaintiff gave an undertaking with sureties, such as is prescribed by section 209 of the Code. To this, it is answered, that the defendant required and obtained a return of the property, by executing, with sureties, such an undertaking as is provided for, by section 211 of the Code.

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The Supreme Court held, in *Rogers v. Hitchcock*, that a plaintiff in replevin, who had executed the proper bond, would not be compelled to give a further bond as security for costs, although not a resident of this State, (9 Wend. 462.) This was, probably, so decided on the ground, that a bond under 2 R. S. 523, § 7, was as broad as a bond under 2 R. S. 620, § 4; and that, by the bond first given, the defendant had been furnished with all the security, to which 2 R. S. 620, entitled him.

The Revised Statutes did not enable a defendant, in a replevin suit, to procure a return of the property to himself, by merely demanding it and giving prescribed security.

There is much, in the provisions of the Code, in support of the proposition, that, when a defendant, in an action to recover the possession of personal property, requires a return of it to himself and complies with section 211 of the Code, he thereby loses and is deprived of all right to bring an action for any purpose, on the undertaking given by the plaintiff to obtain the possession, *pendente lite*.

If the defendant succeeds, the only judgment he can recover, is one for costs. It may, at least, be said, that the Code does not in terms allow him to assess damages for the temporary interruption of his possession. (Code, 277.)

It is quite clear, that the rights of the defendant, in a suit upon the plaintiff's undertaking, may be very different from those of a defendant upon a bond given by the plaintiff in an action of replevin under the Revised Statutes. I think, therefore, that the plaintiff is not exempted from liability to file security for costs, because she gave an undertaking under section 209 of the Code, nor because she does not intend to reside permanently in New Jersey. Security for costs must be filed in twenty days.

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KENDALL v. HODGINS.

A statement made for the purpose of entering a judgment under sections 382 and 383 of the Code, which states as the facts out of which the debt arose; "that heretofore at the City of New York, I (Hodgins,) made my certain promissory note for the sum of two thousand dollars, payable on demand, and that I have not paid said note, and that I am justly indebted to the plaintiff (Kendall,) thereupon, in the said sum of two thousand dollars," is wholly insufficient to authorize a judgment to be entered upon it.

A judgment entered on such a statement, and an execution issued on such a judgment may be set aside, on the *motion* of a *bond fide* purchaser of lands, on which the judgment is an apparent lien, as to such purchaser, and the lands so purchased, and such lands be declared to be freed and discharged of and from the apparent lien of such judgment, and of and from any and every proceeding whatsoever, under and by virtue of, or founded on such judgment.

(Before BOSWORTH, CH. J., and HOFFMAN, WOODRUFF, and PIERREPONT, J.J.)
Heard, Oct. 9; decided, Oct. 23, 1858.

APPEAL from an order setting aside a judgment and execution.

This action came before the Court at General Term, on an appeal by the plaintiff from an order made by MR. JUSTICE WOODRUFF, on the 8th of July, 1858, vacating a judgment entered in favor of the plaintiff, against the defendant, under sections 382 and 383 of the Code. The order was made on the application of H. F. Pohlmann, a *bond fide* purchaser from said defendant of lands, on which such judgment was an apparent lien, and which lands the plaintiff had caused to be advertised to be sold under an execution issued on such judgment. The statement and confession, on which the judgment was entered, read as follows:

"I do hereby confess judgment in this cause in favor of Josiah F. Kendall, for the sum of two thousand dollars, and authorize judgment to be entered therefor against me.

This confession of judgment is for a debt justly due to the plaintiff arising upon the following facts.

That heretofore at the city of New York, I made my certain promissory note for the sum of two thousand dollars, payable on demand, and that I have not paid said note. And that I am justly indebted to the plaintiff thereupon, in the said sum of two thousand dollars.

Signed,

JOHN HODGINS."

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Judgment was entered in this Court, on said statement, on the 5th of October, 1856, for \$2000, with \$5 costs, and a transcript of the judgment was filed, and the judgment was docketed in the office of the Clerk of Queens County, on the same day.

The deed from the defendant and his wife to Pohlmann, is dated the 10th of October, 1856, and was recorded on the 28th of October, 1856, in Queens County; the real estate conveyed by it being situated in that county.

Pohlmann's attorneys were employed by him to search the title of the property so conveyed, and for liens and encumbrances upon it, and they caused the Clerk of Queens County, to search for conveyances, mortgages, judgments, and other liens and charges upon the property. The Clerk made a search, and certified the result, and by his certificate it appeared that no judgment against Hodgins, docketed in Queens County, was found. Pohlmann believing the property to be free from any such encumbrance, and having notice of no facts calculated to excite a suspicion to the contrary, bought the real estate, and took a conveyance of it, subject to a mortgage upon it for \$1000, and subject also to a lease of the lots, for the price or sum of \$2750. Pohlmann paid to Hodgins \$1750 in cash, and assumed the payment of the said mortgage as the balance of the purchase money. The plaintiff having caused an execution to be issued on said judgment, and the lands, so bought by and conveyed to Pohlmann, to be advertised for sale, Pohlmann, on affidavits showing the facts before stated, and on notice, moved for and obtained an order vacating the said judgment as to him, and as to the lands so conveyed to him, and setting aside the execution, unconditionally, and an advertisement of a sale of said lands under said execution, and declaring the said lands to be freed and discharged of, and from the apparent lien of said judgment, and of, and from any and every and all proceedings whatsoever, under and by virtue of the same. From that order the plaintiff appealed to the General Term.

H. D. Lapough, for the appellant, insisted that none but judgment creditors could move to vacate the judgment, that the plaintiff, who was a mere grantee under a deed containing full covenants that the lands conveyed were free and clear of all

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encumbrances, (except the mortgage and lease recited in it,) was not in a position to make such a motion, and that the execution could not be set aside absolutely.

J. B. Scoles, for the respondent.

BY THE COURT. BOSWORTH, CH. J.—The statement on which the judgment was entered is insufficient. (*Chappel v. Chappel*, 2 Kern. 215.)

H. F. Pohlmann, who moved to vacate it, is a *bond fide* purchaser of the premises on which it is an apparent lien, and which the plaintiff had caused to be advertised to be sold under an execution issued on such judgment.

The effect of an insufficient statement, or who may move to vacate a judgment entered on a statement which does not authorize such entry, the Code has not declared. (Code, §§ 382, 383, 384.)

In *Dunham v. Waterman*, 17 N. Y. R. 14, Selden, J., in speaking of the section of the Code, which prescribes the particulars essential to a sufficient statement, and of its design and meaning, employs this language:—

“The provision does not relate to a mere matter of form, or the manner of conducting a judicial proceeding, but is one which affects substantial rights. It virtually constitutes a condition precedent to the right of the party to confess the judgment at all. Although the Code does not, in terms, enact, as was done by the act of 1818, that a judgment confessed, without a compliance with its provisions, shall ‘be decreed and adjudged fraudulent’ in respect to ‘other *bond fide* judgment creditors;’ yet, considering the object in view, it must be plain that such must be its meaning.”

Section 6 of the Act of 1818, declares that if a judgment be confessed without complying with the provisions of that act, “such judgment shall be taken, decreed, and adjudged fraudulent, as respects any other *bond fide* judgment creditors, and every *bond fide* purchaser for valuable consideration of any lands bound or affected by such judgment.”—Sess. Laws of 1818, chap. 259.

If the object and meaning of the two statutes are the same, then it follows that the judgment in question is as absolutely fraudulent, as against a subsequent *bond fide* purchaser, as against

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a subsequent judgment creditor. The right of the former to be relieved against it is as perfect as that of the latter.

It is settled that a judgment creditor may obtain relief against such a judgment by motion: *Chappel v. Chappel*, and *Dunham v. Waterman*, *supra*. Relief was granted on motion, because that is held to be an appropriate proceeding to obtain such relief, and because a judgment creditor is a person whom the statute was passed to protect.

But when it is once conceded, or is established, that a *bonâ fide* purchaser is protected by it equally with a judgment creditor, no good reason can be assigned why the former should not be relieved by the same kind of proceeding, in which relief will be granted to the latter.

The general rule is, that no one except a judgment creditor can come into Court to obtain relief against a transfer made, or judgment confessed by his debtor, as being a fraud upon creditors. The general rule is not that a creditor at large cannot obtain relief by motion which he might, in such a case, obtain by action, but that he cannot be heard at all. But a party, who, by statute, is entitled to particular relief, can obtain it by motion, when that is a proceeding in which it is proper for the Court to examine the matters to be considered, and to grant the desired relief.

If a *bonâ fide* purchaser for a valuable consideration cannot obtain relief by motion, it is not apparent that he can obtain any by action. The objection that he is not a judgment creditor, if of any force, is as fatal to his right to maintain a suit, as to make a motion. If held a fatal objection to his right to maintain an action, it must be on the ground that the statute was not designed for his protection.

The Act of 1818, in terms, protected him as fully and absolutely, as it did a judgment creditor. In that respect it created an exception to the general rule that no person, except a judgment creditor, can institute a suit to set aside a transfer or charge made or created by a debtor, in fraud of his creditors.

But if the object and meaning of the provisions of the Code, now under consideration, are the same as that of the Act of 1818, the purchaser should be permitted to resort to the same remedies as the judgment creditor. A proceeding, by motion,

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to set aside an unauthorized judgment, may always be taken by any person, whose right, to be relieved against it, is absolute and perfect.

If the judgment could be treated as absolutely void for defects appearing on its face, so that a purchaser, at a sale under an execution issued on such a judgment, could not acquire any title, it might not be necessary for the protection of a *bond fide* purchaser that it should be vacated. But that view would apply with equal force to a judgment creditor, and if entitled to consideration, would tend to the conclusion that the interposition of the Court was not required for the protection of either.

But the Courts have not acted on that view of the matter, when a subsequent judgment creditor has moved to vacate such a judgment. We think the true view is, that a subsequent *bond fide* purchaser for a valuable consideration, is entitled to the same relief, and may obtain it, by the same mode of procedure as a subsequent judgment creditor. And that as Pohlmann's character, as such a purchaser, is not questioned, it was proper to grant to him, upon motion, the relief to which he is entitled. (*Martin v. Martin*, 3 Barn. & Ad. 934; *Reed v. Bainbridge*, 1 Southard, 351; *Bonnell v. Henry*, 13 How. Pr. R. 142; *Barrow v. Bospham*, 6 Halsted, 110; *Howland v. Ralph*, 3 J. R. 19; *Seaving v. Brinkerhoof*, 5 J. Ch. R. 329.)

The authorities, cited in the opinion of Judge Hoffman, in connection with those to which we have referred, seem to us to sustain the practice pursued in this case. The order, therefore, will be so modified, as to set aside the said "execution," and all proceedings had under it, "so far as they relate to, or affect the said real estate," and in all other respects will be affirmed, with \$10 costs.

HOFFMAN, J.—The principal question is, can a purchaser, for a valuable consideration from a judgment-debtor, without actual notice of the existence of a judgment by confession, but misled, after due diligence, into a belief that it did not exist, obtain relief, upon motion, against such a judgment, on the ground of its being fraudulent and void?

The judgment in the present case is undoubtedly void as to every person entitled to question it. The statement is insuffi-

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cient, and such as to render the (confession) totally inoperative, and liable to be deemed and adjudged fraudulent as to *bond fide* judgment-creditors." The condition precedent on which a confession can alone be supported, has not been complied with." (*Dunham v. Waterman*, Ct. of App. 6 Abbott, 257; *Chappel v. Chappel*, 2 Kernan, 215.)

The 8d chapter of Title 12 of the Code, under the head of "confession of judgment without action," prescribes in what cases the confession may be made (§ 382); the essential particulars of such statement, and that it shall be verified and may be filed (§§ 383, 384). It is silent as to the parties who may take advantage of any omission or violation of the requisites of the statement, or other directions.

The statutory provisions of 1813 and of 1830, regulated the course upon confessions to a certain extent, but are equally silent as to the parties entitled to interfere, or as to whom the defective statement shall be void. (1 R. L. 416, § 3; *Ibid*, p. 501, § 5; 2 R. S. 1830, 360, § 10.)

In 1818 it was enacted, that if the plaintiff, in any judgment by confession on warrant, omitted to file the specification or statement therein prescribed, "such judgment should be deemed and adjudged to be fraudulent as respects any other *bond fide* judgment-creditors, and every *bond fide* purchaser for valuable consideration." (Laws, 1818, ch. 259, § 8.)

I have found the following cases, expounding or depending upon this act: *Lawless v. Hackett*, 16 John. Rep. 149; *White v. Williams*, 1 Paige Rep. 502; *Brinkerhoff v. Marvin*, 5 John. Ch. Rep. 320; *Seaving v. Brinkerhoff*, *Ibid*, 329; and *James v. Morey*, 2 Cowen, 246.

A purchaser under a junior judgment was held within the act (1 Paige, 506). And a voluntary assignee for the benefit of creditors generally, was held not within it. He was not a purchaser for a valuable consideration, in the sense of the act. The term purchaser was used in its common and popular sense. (5 John. Ch. Rep. 329.)

In *James v. Morey*, Justice WOODWORTH considered that a mortgagee was a purchaser under the act, and Chief-Justice SAVAGE held otherwise. The former was of opinion that notice of the judgment was of no importance. The party had a right

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to consider it fraudulent. If notice of such a judgment was a substitute, the statute would be a nullity.

It has escaped attention (as far as I am aware) in all the cases, that this statute was repealed in 1821 (Sess. Laws, 9 Feb. 1821, ch. 38). It was also repealed in the general repealing act of 1828 (3 R. S. 180, § 265). And Ch. J. SAVAGE remarks, "that when the Courts carried it so far as to require every item of the plaintiff's demand to be stated in the specifications, the Legislature seem to have considered the remedy worse than the disease, and repealed the act" (2 Cowen, 814).

Yet we find it to be settled law, by the cases in the Court of Appeals referred to, that the object of the Code, and of the Statute of 1818, was the same; that the particularity exacted by the latter, is requisite under the former; and that a judgment confessed without a compliance with the provisions, is as void and fraudulent under the Code, as it was under the Statute. As to whom it is so void, is left an open question, except as to judgment-creditors.

Whatever may have been the motives for repealing the Act of 1818, the question remains: Did the statute give originally to *bonâ fide* purchasers a right which they never possessed before, or, upon general principles, would not possess, to interfere with and procure the cancelment of a judgment fraudulently confessed? or, was the statute only an enumeration of those who, being entitled before, upon general principles, should be entitled under the act, when its requirements were neglected or violated?

In my judgment, the latter is the true conclusion, and is warranted by settled principles and authorities of the common law.

The writ of *audita querela* was anciently the mode of obtaining relief against judgments, either by a party to the record, upon matter which he could not have pleaded, or by strangers (5 Taunton, 558; 2 Bingham, 41; 2 John. Cas. 258; *Ibid*, 227). So late as 1824, it was said by BEST, J., that it was neither an obsolete nor difficult proceeding. (2 Bingham, 41.)

But it has been superseded to a very great extent, if not entirely, in our State, by a motion to vacate the judgment; upon which, whenever the question offered is not clear, an issue may be directed. In *Wardell v. Eden* (2 John. Ca. 258), however, the Supreme Court left the party to his writ of *audita*

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querela, in a case of disputed facts; and in *Brooks v. Hunt* (17 John. Rep. 484), it was said not to be an uncommon thing to refuse the relief in a summary way, on motion, and to put the party to this writ.

Now it was settled at the common law, that if one man acknowledge a statute merchant or statute staple to another, who afterwards releases it, and the conuzor aliens his land to a stranger, the stranger may have *audita querela* against the conuzee after execution sued out, though not before. (17 Ed. 3. 27 b. cited 3 Viner Ab. 321, with other cases from the year books.) These authorities are recognized in *Waddington v. Vredenberg*, (2 John Ca. 229.)

So a purchaser could have this writ to compel a judgment or statute creditor to comprise in his extent, every parcel of land bound by the judgment or statute, although in the hands of various feoffees or tenants. He was to make the debt out of the rents and profits, and the various holders under the conuzor or judgment debtor, were thus by the common law made to contribute proportionately to the payment (Brookes Ab. Tit. *Audita Querela*. Coke's Reports, 3, 14 b. Viner's Ab. vol. 3, p. 339, fol. 9. Ibid. 343, fol. 5. Ibid. 349 M. Pl. 1.)

The statute 16 and 17 Car. 2d. cap. 5, made perpetual by 22 and 23 Car. 2, cap. 2, recited this to be the rule of the law; and provided, that where a judgment, statute, or recognizance had been extended, it should not be avoided or delayed, because part of the lands extendible were omitted out of the extent; saving, however, to the party whose lands were extended, the right of contribution from those whose lands were omitted.

In *Prynne v. Houghton*, (2 Ventris 104) it was held, that the statute only applied, when the extent had been executed, and the tenant brought *audita querela*. But it did not apply before execution; and hence upon a *scire facias* to revive a judgment, one tenant could plead that others were not warned.

So in one of the cases cited in the abridgements before referred to, it was held that this writ did lie on behalf of an alienee of a conuzor in a statute staple, to compel the conuzee to extend lands still held by the conuzor, before his own could be resorted to. And this ancient authority is the foundation of the rule now settled, that a Court of Chancery will compel the sale of pre-

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mises subject to an incumbrance, in the inverse order of alienation. (*Clowes v. Dickenson*, 5 John Ch. Rep. 239; *Gouverneur v. Lynch*, 2 Paige 300; *Aichen v. Maclin*, 1 Drury & Walsh, 621.)

Nothing can be more striking than these old authorities to show a preventive power in a court of law, through the medium of its own process, to avert the infliction of a wrong upon even third parties, by color of its own judgments, or execution under them, or under instruments, to enforce which process from the Court must be resorted to.

In *Harrod v. Benton* (8 Barn. Cres. 217) Lord Tenterden said, "I think the Court has a jurisdiction over a warrant of attorney, which it may exercise at the instance of any party who has an interest in supporting it, or setting it aside." The applicant was, it is true, an execution creditor.

In *Martin v. Martin*, (3 Barn. & Adol. 934) a landlord was allowed to impeach a judgment confessed by a mother-in-law to her son-in-law. There was misrepresentation and deceit on the part of the debtor and creditor, which induced the delay of a distress. TAUNTON, J., said, "I also doubted whether we could interfere at the instance of a third person, but I think in this case the Court may do so by virtue of its general jurisdiction over warrants of attorney, and because this is a fraudulent transaction. The landlord, by his lien, would have been *quasi* owner of the property, and in that respect he may be considered for the present purpose as representative of the debtor."

In *Reed v. Bainbridge*, (1 Southard's Rep. 35) it was expressly decided that such an application may be made on behalf of a *bonâ fide* purchaser from the judgment debtor.

In South Carolina there is a statute that confessions may be taken before a clerk, in a manner prescribed, and judgment entered thereupon. It is then provided that every person aggrieved by such confession, may file a suggestion, and impeach the judgment. In *Sutton v. Pettus*, (4 Richardson's Reports, 163) it was held, that a purchaser from the judgment debtor was within the act.

In both these cases, that of *Howland v. Ralph*, (3 John. Rep. 20) is referred to as an authority, that a purchaser could have this redress. McNee was, there, a purchaser from the defendant, the judgment debtor by deed in 1804. A judgment was dock-

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eted in favor of the plaintiff in 1803. The motion was to set aside the execution, on the ground of the debt being paid, and that the judgment was collusively kept in force. The affidavits of the plaintiff met these charges fully, and insisted that the bond was still lawfully due. The Court disposed of a question of regularity against McNee, and then said, that if there was fraud, (and there was color for the suggestion on the affidavits) he was undoubtedly entitled to relief. But it could not interfere effectually upon the present motion. The sheriff had sold under the judgment, and an order staying the delivery of the deed had been made.

This was extended to the next term, "so as to give McNee an opportunity to apply in the meantime to the Court of Chancery for relief, or to put the question of fraud and collusion in a train for trial at law, by an issue in fact."

This case fully sustains the right of a purchaser to affirmative relief in some form, and indicates strongly that it can be had by an issue directed in the Court of Law.

Swan v. Saddlemire, (8 Wendell, 676,) determined that case will lie by a purchaser against the plaintiff and defendant in a judgment for fraudulently setting it up as unsatisfied, when it was paid, and causing an execution to be issued thereon against the land of the purchaser.

In *Neusbaum v. Keim*, (7 Abbott, 23 C. P. Gen. Term,) it was held that a judgment founded upon an insufficient statement, was void as to the debtor's grantees, although it might be valid as to the debtor himself. The case arose upon an action by the judgment creditor, to set aside a conveyance of real estate as fraudulent, and the complaint was dismissed.

In *Bonnell v. Henry*, (13 Howard Pr. Rep. 142,) Mr. Justice HARRIS states, that he does not understand the right to have an illegal judgment removed, to be confined to a judgment creditor. Of course he was not intimating that other creditors possessed it.

It is true, that the same careful Judge held in *Beckman v. Kirk*, (15 Howard, 230,) that a voluntary assignee for creditors at large could not resort to such a motion. But there appears to me to be a marked and important distinction between such an assignee, and a purchaser for valuable consideration; and that the learned Judge would be wholly free from inconsistency if he

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granted the relief on behalf of the latter. Indeed, Chancellor Kent, in a case before cited, arising under the act of 1818, takes and acts expressly upon this distinction. (*Seaving v. Brinkerhoff*, 5 John. C. H. R. 329.)

It is urged that the grantee of a judgment debtor, can stand in no better position than his grantor; and hence, upon the concession that the debtor was bound by the judgment, the grantee cannot impeach it.

But in numerous instances a *bond fide* purchaser has a better standing, and is entitled to higher rights and immunities than his grantor, or volunteers under him possess.

Under the Statute of 27 Elizabeth, it is the English rule to this day, that a purchaser for valuable consideration, even with notice of a prior voluntary deed, acquires the better title, and can set it aside. (*Cathcart v. Robinson*, 5 Peters' U. S. Rep. 264; *Newman v. Rusham*, 9 Eng. L. & Eq. Rep. 410.) The rule as laid down by the Supreme Court of the United States is, that the voluntary conveyance is merely presumptively fraudulent, as to a subsequent purchaser without notice. The presumption there was not repelled.

Now under either rule, the grantor himself could not set aside the conveyance; neither could his heir or devisee. (*Jackson v. Garnsey*, 16 John. 189; *Anderson v. Roberts*, 18 Ibid, 515.)

So a grantee in a subsequent voluntary deed cannot avoid a prior voluntary grant, (*Roberts* on Fraudulent Con. p. 646;) and it is held in the Queen's Bench, that a purchaser from an heir or devisee of the grantor could not avoid the voluntary grant of the ancestor. (*Newman v. Rusham*, 17 Queen's B. Rep. 723.) Yet it is clear that a purchaser for value from a voluntary grantee becomes vested with a better title than his grantor, and renders the voluntary deed, in effect, a purchase. (*Ibid.*)

It is justly observed by Judge SUTHERLAND, that a voluntary conveyance is a deed without any valuable consideration; and the character of purchase or voluntary is determined by the fact whether anything valuable passed between the parties. (4 Wendell, 804.)

Again, a deed may be asserted as fraudulent in fact, by a *bond fide* purchaser, while it remains valid as to the grantor and his heirs. (*Wadsworth v. Havens*, 3 Wendell, 411.)

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And so, a purchaser for valuable consideration without notice, acquires a title, although he buy of one who obtained a conveyance by fraud, and had no title. (*Jackson v. Walsh*, 14 John. Rep. 407.)

These examples show how extensively the law protects and aids a *bona fide* purchaser, when his grantor would be left without redress.

It is true that in the vast majority of cases, such applications are made on behalf of judgment creditors. But many circumstances will account for the infrequency of a motion by a purchaser. He usually is apprised by his searches, of judgments and procures their removal, or regulates his purchase money accordingly, or if in possession, is content to wait and resist any action on the part of the judgment creditor.

It is an argument of no little weight against this application, that the invalidity of the judgment appears upon its face, and that the power of a Court of Equity cannot be invoked to remove or cancel an instrument so void, upon the ground of its being a cloud upon the title. (*Craft v. Merrill*, 14 N. Y. Rep. 456; *Heywood v. The City of Buffalo*, *ibid*, 542; *Ward v. Dewey*, 16 *ibid*, 520; *Scott v. Onderdonk*, 14 N. Y. Rep. 9.)

But, if this doctrine is applicable to motions to set aside judgments, under the common law power of a Court over its records, it would be in general as applicable when a prior judgment creditor moves, as in other cases. Particularly would it be so, when a purchaser, under a prior judgment, applies, who it has been held may do so. (1 Paige 506, before cited.)

I apprehend that an exception to this rule exists in the case of judgments, and upon the principle, that a Court possesses power and control over its own records, so that it may always remove and cancel them, when they are fraudulently obtained or supported, and when innocent parties are aggrieved by them, who have not become expressly, or by clear legal implication, bound by them. (20 John's Rep. 296; 2 John. Ch. Rep. 144; 12 Wendell, 222; 5 John. Ch. Rep. 324; 9 John. Rep. 80; 6 Halstead's Rep. 110; *Reading v. Reading*, 4 Zabriskie's Rep. 361.) When the facts are plainly made out, the Court decides at once; when they are doubtful and contested, an issue is directed. The 72d section of the Code, abolishing feigned issues, sanctions such a course in the form there prescribed.

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My conclusion is, that the order should be affirmed, with the modification that the execution and levy be set aside, only so far as relates to the premises in question.

LAURA KEENE v. JOHN LA FARGE.

If a sole defendant die pending an action after issue joined therein, and before trial, his personal representatives have no right to an order requiring the plaintiff to continue the action against them, as the defendants therein. In such a case, the plaintiff, at his election, may require it to be discontinued.

(Special Term, October 28, 1858, before BOSWORTH, CH. J.)

THE defendant having died, leaving a last will and testament, by which Louisa La Farge and John Binsse were appointed his executrix and executor, and letters testamentary having been issued to them, they, on an affidavit of these facts, and on the pleadings, now move "for an order to continue this action in the name of Laura Keene, as plaintiff therein," against them as such executrix and executor, "as defendants therein, and to declare said action to be in the same plight and condition as the same was at the time of the death of John La Farge." The action was at issue on complaint and answer when La Farge died. The complaint sets out a written and sealed lease, executed by John La Farge, to the plaintiff, of the Metropolitan Theatre, and alleges performance of all the covenants on her part, and that John La Farge, during the term granted, "wrongfully, and in violation of the covenants of said lease, evicted this plaintiff from said premises, and refused to fulfill the covenants of said lease." The answer denies that she kept the covenants on her part, and avers that she failed to pay the rent when due, and was, for that cause, dispossessed by summary proceedings, pursuant to statute, which are set forth.

H. A. Cram, for the motion.

E. L. Hearne, *contra*, insists, 1st. That the cause of action does

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not survive; and 2nd, That the executrix and the executor cannot make such a motion, and that the plaintiff alone can make it; and 3rd, That she does not desire to have the action continued.

BOSWORTH, Chief-Justice.—In so far as this action proceeds on the idea of a breach by John Lafarge of his implied covenant of quiet enjoyment by the plaintiff (3 Kernan, 151), it sounds in contract, and continues. In so far as it is based on the allegation of a wrong done by John Lafarge to the rights of the plaintiff, as his lessee, it continues by force of section 1 of 2d Revised Statutes, p. 447.

The only other question is, whether the representatives of the deceased defendant may move for and obtain an order continuing the action, or whether the option is given to the plaintiff alone to move, or to omit to move, for such an order? The only authority for such a motion is that furnished by section 121 of the Code. By that, after the lapse of a year from the death of a party, the Court cannot allow the action to be continued, except upon "a supplemental complaint;" such a proceeding cannot be taken by a defendant.

Prior to the Code, the death of a sole plaintiff, or of a sole defendant, before verdict or interlocutory judgment, abated an action at law, and it could not be continued by or against the representatives of the deceased (2 R. S. 386-389): The Chancellor decided, in *White v. Buloid* (2 Paige, 475), that the personal representatives of a sole complainant who had died, might, on their own motion, be substituted as complainants under section 115, 2 Revised Statutes, p. 184. The language of this section is as general as that part of section 121 of the Code, which applies to motions made within a year after the death of a party, with the exception that section 115 applies only to the case "when a complainant shall die." But I find no provision in the Revised Statutes broad enough to enable the representatives of a deceased sole defendant to make such a motion. Section 126 (120) evidently applies to the case of the death of one of two defendants, and not to the death of a sole defendant.

If only the representatives of *such* a deceased party can make a "motion," within one year after the death, as can be allowed

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after the year, "on a supplemental complaint," to continue the action, then it would appear that section 121 was designed to confer on the representatives of a deceased sole plaintiff only, the election to continue the action or to abandon it, and that it was not designed to enable the representatives of a deceased sole defendant to compel the plaintiff to continue the action against his will: Such a construction does not deprive the representatives of a deceased sole defendant of any rights which they had prior to the Code, nor confer on the representatives of a deceased sole plaintiff any rights which those of a deceased sole "complainant in a suit in equity" did not possess, although, in actions at law, it enlarges the remedies of the representatives of a deceased sole plaintiff. This construction accords with the view taken of the Revised Statutes by Chancellor WALWORTH, in *Souillard v. Dias* (9 Paige, 393).

Motion denied, without costs; but an order may be entered, that the action be discontinued, unless the plaintiff serve within ten days after written notice of the order to be entered hereon, a consent that an order be entered continuing the action.

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FOUR OTHER SUITS v. THE SAME DEFENDANTS.

A defendant whose family is occupying, and for several years has been occupying, a dwelling-house in another State, hired by him, and who habitually passes the night of each day, and the Sabbath, with his family, is a non-resident of the State of New York, within the meaning of the statutes of the latter State, authorizing an attachment, in an action, of the property of a non-resident defendant.

On such a state of facts, he is a non-resident, although he is in business as a merchant in New York city, and passes eight hours of every business day there, (unless sick, or absent on business of his firm,) and has all his business capital in such business, keeps his bank account there, and had selected such family residence on account of its proximity to the city, and for economy in living, and although he might be served with process in such action, any day, during business hours.

Whether a man's absence from his family be for eight hours in each day, or six days in each week, if he has a family living in a neighboring State, for whom he provides,

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to whom he resorts for comfort, relaxation and repose, and with whom he abides whenever the immediate demands of his business upon his attention will permit; whenever sickness disables him from conducting that business; and when those days successively return on which business ceases, and man rests from his labor; he resides in such neighboring State, where (in every proper sense, as understood no less by those who are learned in the law, than by the common intelligence of every-day life,) is his home.

Where one has a *home*, as that term is ordinarily used and understood among men, and he habitually resorts to that place for comfort and rest, relaxation from the cares of business and restoration to health, and there abides in the intervals when business does not call; that is his *residence*, both in the common and legal meaning of the term: When a man has such a home, and habitually uses it as such, and a place of business in another State, such place of business is not his residence, within any proper definition of the term.

It is not enough that one *intends* to change his place of residence: The intent and the fact of such change must concur. Nor is it enough that he intends to change his residence, and sincerely believes that what he has done amounts in law to a change of his residence. His opinion will not produce that result, nor affect the question, if the actual change have not taken place.

Upon an appeal from an order, founded upon a decision, of a question of fact, upon conflicting affidavits and doubtful circumstances, the order should not be reversed, unless the Appellate Court is satisfied that the decision of the Judge who made it, upon such question of fact, is clearly wrong.

Order affirmed, with costs.

(Before BOSWORTH, Ch. J., and HOFFMAN, SLOSSON, WOODRUFF, and PIERREPONT, J.J.)

Heard, Nov. 27; decided, Dec. 18, 1858.

THIS action comes before the Court on an appeal by the defendants, from an order made on the 9th of October, 1858, by Mr. Justice HOFFMAN, in five several actions in this Court, denying a motion made by them to discharge attachments, that had been issued against the property of the defendant, Wilson, on the ground that he was then a resident of Norwalk, in the State of Connecticut.

The motion was made on affidavits, which, (as the defendants claimed,) established that Mr. Wilson was a resident in the city and State of New York, at the time the attachments were issued. In the suit brought by Chaine, the attachment was issued on the 18th of April, 1858.

In that of *Wilder and others*, it was issued, May 23d, 1858. In that of *Parker and others*, on the 4th of June, 1858. In that of *The Middlesex Company*, on the 18th of June, 1858. In that of *Paige and others*, on the first of July, 1858.

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The motion to discharge the attachments was based on an affidavit made by Mr. Wilson, on the 30th of July, 1858, and on five other affidavits. The affidavit of Wilson is in these words, viz.

"City and County of New York, ss.:

Lewis O. Wilson, one of the defendants above named, being duly sworn, saith: That an attachment has been issued in this action against the defendant, *Lewis O. Wilson*, and levied upon property which belonged to him, on the alleged ground that at the time of the issuing of such attachment on the 25th day of May, 1858, he was not a resident of the State of New York, but resided in the State of Connecticut.

That deponent was for some years a resident of Norwalk, in the last mentioned State, having gone to reside there on a farm belonging to his wife, when he retired from business in the city of New York; and in the year 1856, he resolved to become a permanent resident of the city of New York.

That in that year he conveyed to his fourth son *Oliver*, on his attaining his majority, all the real estate deponent owned at Norwalk, together with all the personal property and moveables connected therewith. And the said *Oliver* took possession of said property, and the farm aforesaid, and what had been the homestead, and assumed the entire and exclusive control of each and every of them, as his own, and has continued to hold and own them, and each and every of them, from that time to this.

That at the time of such transfer deponent, with his wife and youngest boy, now aged about seven years, resided together in said homestead, and composed then, as they have since, his entire family or household, his children, other than said youngest, not dwelling with him.

That soon after deponent had ceased to be a resident of Norwalk, and up to the present time, his wife and child have been for long periods at Norwalk, in the house of his son *Oliver*; but deponent had a room and was a permanent boarder at the *Astor House* for a long time prior to the fall of 1857, and spent most of his time in this city, going to Norwalk usually on Saturday, and remaining over until the following Monday, and sometimes

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going on Wednesday and returning the next day, though his visits of the latter kind were not common.

That in order to select a date, in reference to which the question of evidence may be presented in this suit, and not to admit that his residence was different at any prior date, deponent states that there was no time in the years 1857 or 1858, when, according to his knowledge, information, belief, opinion or intent, he was a resident of the state of Connecticut, but during the whole and any part of said 1857, and so much of 1858 as has elapsed, he has been, and now is, as he believes, a resident of the city and State of New York.

That in the fall of 1857, when the defendants became affected by the commercial embarrassments then so general throughout the United States, it was suggested to deponent that some question might be raised as to his place of residence, and he met the suggestion by the confident declaration, that no such difficulty could arise, as he was a resident of this State. To this position deponent then adhered, as he now adheres, in good faith.

That one of the persons who spoke to him on this subject was Nathan Hendrix, a clerk in the house of defendants, who advised that, notwithstanding deponent's confidence on the point, it was better that all doubts concerning it should, if possible, be removed by deponent's taking his wife and son away from Norwalk, keeping them domiciled here, and establishing the ostensible, as well as the actual character of his residence, by unequivocal indications.

Influenced by such advice, deponent, in the fall of 1857, engaged for himself and said family a parlor and bedroom, at the St. Nicholas Hotel, in said city of New York, and they with him took possession of and occupied said apartments as their only home, from the 12th day of October, 1857, until about the twenty-second day of January, A. D., 1858, when deponent's said youngest boy being ill, and Doctors Pratt and James O. Smith, of said city, being called to attend him, they advised that said boy should, for the benefit of his health, be taken to the country, for which reason (and for which alone,) deponent's wife went with said child to the residence of Oliver, aforesaid, in Norwalk.

That deponent, a few days afterwards, went to see them, intend-

ing the visit to be temporary. That while in Norwalk he became indisposed; afterwards, seriously ill, and continued to be incapable of resuming business, until towards the latter part of May, A. D., 1858, for which reason he was detained, and he continued at Norwalk, without, however, entertaining at any time the intention or idea of ceasing to be a resident of New-York, but intending all the time that his residence should, as he believed did, continue in that city.

That in the month of March, A. D., 1858, deponent's wife returned from Norwalk to New York, with the aforesaid son, and resumed the apartments in the St. Nicholas Hotel, which they had before occupied, deponent expecting and promising that he would follow them to said city, in a few days, but his illness prevented his doing so.

That from the time they left said hotel, in January, until the aforesaid return thereto, in March, some of their personal property had been left there, from the intent and design that they should resume possession of it on their contemplated return from Norwalk.

That about the first of April deponent's said wife went with said boy to Norwalk, aforesaid, and has remained there since with her said son Oliver; but, since deponent was able to remain in the city, and give any attention to his affairs, viz., since the latter part of May, he has been residing at the aforesaid St. Nicholas Hotel, visiting his wife and child, at Norwalk, occasionally, and having recently passed some time at Saratoga Springs, for the benefit of his health.

That at the last mayoralty election held in this city, in November last, this deponent gave and deposited his vote, as an elector, of the city and county of New York, at the polls in said city, believing then, as he now believes, that he had full legal right to do so.

That the various visits made either by deponent's wife or his child, or himself, to Norwalk, as hereinbefore described, were all in fact, and all intended to be temporary sojournings for the pleasure of social intercourse with their son, or other members of their general family, or change of scenery or air, or the safety or improvement of health, but all of them with the intent and determination, in good faith, that deponent's residence in New

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York, and the right or duties connected with it should remain unaffected and unaltered by such sojournings.

That the chief reason why deponent did not have any tenement other than in a hotel, was that it has long been his resolution not to occupy a house in New York, with his family, until he owned one, but to have a home in a hotel, and he has conferred with several of his friends, and made efforts to obtain an eligible property in the city, wherein to have himself and his family permanently established.

And this deponent lastly saith, that since the year 1846, when he resumed mercantile business, in the city of New York, his business has been at all times in said city."

Nathan Hendrix, in his affidavit, deposed that he had read the affidavit made by Wilson, and "that deponent, in the fall of 1857, had a conversation with said Wilson, and gave him advice, the substance and purport of which is correctly stated in said affidavit.

That deponent heard at the time of Mrs. Wilson leaving the St. Nicholas Hotel, with her son, for the improvement of such son's health, as stated in said Wilson's affidavit.

That a few days after her departure, said Wilson informed deponent of his intention to visit his family at Norwalk; saying, in substance, that he thought he should have some recreation, and that he expected to be absent about ten days, but not to exceed, at the utmost, two or three weeks. That as the defendants had then suspended regular payments, in their business, the presence of the said Wilson was not deemed so important as it had been on former occasions; and the embarrassment of the house had given him so much uneasiness, that deponent also thought said Wilson required respite from labor.

That in the month of April, A. D. 1858, deponent saw said Wilson at Norwalk; and deponent states that said Wilson was then quite unwell, and incapable, in deponent's opinion, of attending to his ordinary affairs and business by reason of indisposition."

Robert B. Coleman, made an affidavit, stating, "that previously to the 12th day of October last," (1857,) "said Wilson engaged rooms at the St. Nicholas Hotel aforesaid for himself and his

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family, and he removed with them to said rooms on said last mentioned day. Such family consisted of Mr. Wilson's wife and child, and said Wilson occupied said room with them regularly and uninterruptedly from said day until the 12th day of January last, when in consequence of the child's illness, as deponent was informed and believes, Mrs. Wilson and such child went to Connecticut.

Mrs. Wilson and the child returned to said hotel on the 22d day of March then next; and on the 30th day of March following she left the hotel with the child to go again to Connecticut, as deponent was also informed and believes."

"*James O. Smith*, of said city, being duly sworn, saith: That he is a practising physician in said city, and has been such for thirty-three years. That on the 17th, 18th, 19th and 20th days of January last, he was called to attend in his professional capacity a child about ten or eleven years of age, who was, as deponent was informed and believes, a son of L. O. Wilson above named. Deponent found the boy with his mother in apartments at the St. Nicholas Hotel, in the city of New York. The said child was taken by his mother to Connecticut for the change of air, and other benefits which deponent thought would result from the removal; such advice was given professionally, and as the spontaneous result of deponent's observation and judgment."

"*Ira Gregory*, being duly sworn, deposes and says: That he resides in the town of Norwalk, in the State of Connecticut, and is a physician duly licensed to practise medicine and surgery, and knows Lewis O. Wilson, one of the defendants named in each of the above entitled actions. And deponent further says, that he visited the said Lewis O. Wilson at Norwalk, aforesaid, in a professional capacity, several times during the months of February and March last.

That at these several times or visits in February and March, 1858, deponent found said Lewis O. Wilson suffering with very severe rheumatism, accompanied with tumors about the head and neck, and a stiffness and pain in his neck, and incapacitated to attend to any business away from his room; that said Lewis O. Wilson was then and there advised by deponent not to return to New York until he recovered himself from the severe attack of rheumatism he then labored under.

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That deponent believed and looked on the said Lewis O. Wilson as being a citizen and resident of New York for the last three years, or since he sold and conveyed his homestead property in Norwalk to his son, Oliver Wilson.

That said Lewis O. Wilson was not in the habit of attending town meetings or elections in this State since he conveyed his said property as above mentioned."

Of the opposing affidavits, several were made by residents of Norwalk, Connecticut, and were to the effect, that Mr. Wilson has resided in Norwalk for many years past, and that the affiants had frequently seen him at his residence there, during the winter and spring, and summer of 1858. That they had also, up to the date of their affidavits, (August and September, 1858), every few days, seen his wife and family there, during the winter, spring and summer, then just past. That they had always heard him spoken of at Norwalk, as a resident of that place. The other opposing affidavits are to the effect, that he voted at Norwalk, at the Presidential election in 1856. He was assessed as a resident of Norwalk in 1858, the usual poll tax, and was regarded and treated by the Board of Assessors as a resident of that town. His wife regularly attends church at Norwalk.

Up to October, 1857, during the active business season, he was at the Astor House several months at a time, at other periods, two or three days, or a week at a time, and the intervals he passed at Norwalk. He at no time, had more than an ordinary bed room at the Astor House, and paid the usual price of a guest of said hotel. He had no permanent lodging room, except during the business season; at other times he had no regular room, but occupied such as was assigned him. He had very little baggage there, and usually only a carpet-bag. That he went, to the St. Nicholas Hotel, with his family, in October, 1857, and they left in January, 1858, and then gave up the apartments he had occupied with his family. While there he paid his bills weekly. In March 1858, his wife and part of his family returned and stayed a few days, and then left, giving up the apartments they had occupied. When Mr. Wilson has been there since, he has been assigned some vacant room, and he has been charged as other temporary guests. That applications were made, at the St. Nicholas Hotel in September, 1858, for

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Mr. Wilson, in order to serve papers on him. He could not be found there, and the answer made, to enquiries for him, was that he was not staying there, and had no room there.

No notice of any application to vacate or set aside the attachments, was given until the 31st of July, 1858, after judgment had been perfected in each action, and an execution on such judgment, had been issued, and levied on the property of Mr. Wilson.

James T. Brady, for defendants and appellants, upon the question, what constitutes domicile? and of its continuance; and of the effect of intent, and other circumstances in determining the place of one's domicile, cited and commented on, *Putnam v. Johnson*, 10 Mass. 488; *Parsonsfield v. Perkins*, 2 Greenl. 411; 23 Pick. 170; 8 Shep. 479; 10 Pick. 377; 3 Greenl. 455; 11 Pick. 410; 13 Mass. 501; 2 Harr. 138; *Parsons on Contracts*, vol. 2, p. 90; Note to 1st Binney, 840.

He contended, that, Wilson was a resident of New York, within the meaning of the statutes prior to the Code, allowing attachments against non-residents, and that this proposition was established by the decisions in, *Matter of Thompson*, 1 Wend. 43; *Matter of Wrigley*, 8 Wend. 134, and *Frost v. Brisbin*, 19 Wend. 11.

He insisted, that the affidavits established certain facts, which showed that Wilson was a resident of New York, when the attachments were issued, viz.:

"1. His business and property of every kind were in New York, and always had been, since 1856.

"2. He had no tenement or habitation in Norwalk. When there he was a mere guest of his son.

"3. He came here from Norwalk to make his 'home' here, and so declared.

"4. It was his interest to continue his residence here, so as to avoid an attachment of his property.

"5. He returned here as soon as his health would permit, after his temporary absence from January to May.

"6. After returning he remained here with the continued intent to reside here. And he was no more a resident of Norwalk than of Saratoga, where he went for the benefit of his health."

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He insisted, that the order appealed from was erroneous, and should be reversed.

John W. Edmonds, for the respondents, in four of the actions, and

David Dudley Field, for the respondents, in the other action, analyzed the various affidavits and commented on the facts relied upon, on the one side to show that Wilson's residence was in New York, and on the other to show that it was in Connecticut, and also made and argued the following points, viz.

I.—This is the ordinary case of a person doing business in New York, and being in the city only while his business required him here, and for all purposes of family or residence, living in Connecticut.

II.—His avowed intention to be a resident in New York might serve to characterize a doubtful act, but is not enough to overthrow the fact of actual residence abroad.

III.—The defendant was actually resident in Connecticut, within the meaning of the Code and of the various cases on this subject. (*Roosevelt v. Kellogg*, 20 J. R. 208; *Matter of Wrigley*, 4 Wend. 602; *S. C. in Error*, 8 *Ibid.* 134; *Frost v. Brisbin*, 19 *Ibid.* 11; *Crawford v. Wilson*, 4 *Ibid.* 505; *Drake on Attachments*, § 67; *Houghton v. Ault*, 16 How. Pr. R. 78; *Barry v. Bockover*, 6 Abbott, 874; 1 Bradford's Rep. 85-90; Code, §§ 33, 125, 135, 292, 391.)

BY THE COURT. WOODRUFF, J.—We held, in the case of *Barry v. Bockover*, at the General Term of April, 1858, that a defendant, whose family have for more than seven years occupied, and still occupy, a dwelling in Jersey city, in the state of New Jersey, hired by him, and who habitually passes the night of each day, and the Sabbath, with his family, is a non-resident of this State, within the meaning of our present statute authorizing an attachment of the property of a defendant in an action, although such defendant was engaged in business as a merchant in this city, spent eight hours of every business day (unless sick, or absent on business of his mercantile firm,) in this city; had all his business capital invested in such business; kept his individual bank account here; and had selected New Jersey as his family

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residence solely on account of its convenience for access to the business portion of this city, and for economy in living; and, notwithstanding process in the action, might at any time within the business hours of the day, have been served upon him personally, and was in fact served upon him in the action in which the attachment was issued.

It is therefore to be deemed settled, in this Court, that the right of a plaintiff to have the property of a defendant attached on the ground of his non-residence, does not depend upon the question whether the defendant can be served with the summons in the action, but that the attachment may issue, however convenient it may be to serve the defendant personally with process.

Also, that the carrying on of a mercantile business in this city, and staying within our limits, for the purposes of business, during all the hours usually devoted to business here, do not alone constitute residence within the meaning of the statute. And it follows, as a necessary consequence of this proposition, and is involved in the principle of the ruling, that, whether a man's absence from his family be for eight hours in each day, or six days in each week, if he has a family living in a neighboring State, for whom he provides, to whom he resorts for comfort, relaxation and repose, and with whom he abides whenever the immediate demands of his business upon his attention will permit; whenever sickness disables him from conducting that business; and when those days successively return on which business ceases and man rests from his labor; he resides in such neighboring State, where (in every proper sense, as understood no less by those who are learned in the law, than by the common intelligence of every-day life,) is his home.

We did not deem it necessary for the purposes of that case, and do not deem it necessary for the purposes of the present, to review or recite the various learning to be found in the books, upon the question, how far residence and domicile are synonymous, or how, in certain cases, they differ.

In the case above referred to, the State of New Jersey was the defendant's domicile, within every definition of that term, and it was not less clearly his residence. It was his abiding-place. He left it, with intent to return so soon as his labors were remitted: He returned to it with intent to remain until

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called to resume those labors. New York was his place of business, New Jersey his place of abode. In New York was his workshop. In New Jersey was his house, his shelter, his fire-side, his bed and board. We know of no definition of either domicile or residence which the former will satisfy, nor of any in which the latter will not answer in every particular.

And for like reasons we did not then, and do not now, think it necessary to review the cases in this State in which a man has been held a non-resident within the "spirit" of our former statutes, who has an actual residence out of the State, though he have a family within this State, or have a domicile here, (see those cases collected and discussed by Mr. Justice JAMES in 16 How. P. R. 77, and further by Mr. Justice Hoffman at Special Term in this case.) That long-continued absence in a fixed location, carrying on a business permanent in its nature; or long-continued absence in such location for the purposes of business, the duration of which was uncertain; or absence for several months, in pursuance of an intention to make a permanent location for residence and for business, and an actual location and commencement of such business, though the removal of the family have not yet taken place—should be held to constitute non-residence within the spirit of those statutes, proves nothing in reference to such a case as the one above referred to: the question of their present actual residence, was the question considered in those cases, and was decided in favor of the attaching creditor.

But in no case has it been decided that where the debtor lives with his family in this State, returning to them from day to day or from week to week, he is an actual non-resident, (even within the "spirit" of any law touching non-residents,) merely because he passes the business hours of the day, or the business days of the week, when his health will permit, and his business requires it, in his store or manufactory without the bounds of the State.

In such a case the liability of the party to taxation, to render service as a juror, or to enrolment as one of the militia, we apprehend would not be seriously questioned.

Ordinarily one's residence and domicile (if they do not always mean the same thing) are in fact the same, and where they so concur they are that place which we all mean when we speak of one's *home*.

And it may safely be asserted that where one has a *home*, as that term is ordinarily used and understood among men, and he habitually resorts to that place for comfort, rest, and relaxation from the cares of business and restoration to health, and there abides in the intervals when business does not call—that is his residence, both in the common and legal meaning of the term. And to one who has such a home, and habitually uses it as such, a place of business elsewhere, is not his residence within any proper definition of the term.

When the question, where is his residence, arises, some of the proofs, or the indicia by which the place is to be determined, vary with the circumstances of the party. One has a family, another has none—one lives in a state of alienation and separation from his family, another lives with them—one owns or hires a dwelling-house, another has lodgings at an inn—and another may have a much more uncertain shelter. None of these circumstances are necessarily alone conclusive—they are not decisive tests—they are only aids to an answer to the question to be considered in connection with all other pertinent facts which may appear.

So when the fact of residence in a place is ascertained or conceded, it is to be deemed to continue until there is proof of a change of location, with intent to make such location a new home, in the sense above already described, not merely for a temporary purpose, but with a fixed purpose to remain, and without a present intention to return when some temporary purpose is accomplished.

And again, it is not enough that one intends to change his residence. The intent and the fact of such change must concur. Nor is it enough that he intends to change his residence, and sincerely believes that what he has done amounts in law to a change of his residence, his opinion will not affect the question, if the actual change have not taken place.

Enough has now been said (and probably more than enough) to make our views of the case before us intelligible.

The defendant, Wilson, was confessedly a resident of Norwalk, in the State of Connecticut, in the year 1856.

It will throw light upon the proper weight to be given to his affidavit (upon which the claim to discharge the attachment

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mainly depends), if it be noticed, that he states that he then "resolved to become a permanent resident of the city of New York," and that he further states that "during the whole and any part of the year 1857, and so much of the year 1858 as has elapsed, he has been and now is a resident of the State of New York."

What then did he do in 1856, which made him a resident of the State of New York? The answer to this question may perhaps aid us not only in determining what he means when he swears to residence, and what sort of sojourn in New York he *intended* by what he calls a resolution to become a permanent resident, and what he understands and means by "*permanent residence*."

He left his family in Norwalk on the farm, theretofore occupied by them, came to New York on Monday, devoted himself to his business here, sometimes until Wednesday, and then returning to his family, and again returning to New York on Thursday—but usually staying in New York until Saturday, and then returning to his family in Norwalk. While in the city boarding at a hotel as an ordinary guest, and occupying a bedroom only—and this continued until the fall of 1857.

After what has been already said of such a course and habit of life, it is only necessary to add, that this neither in fact nor in law made him a resident of the city of New York. And if we assume that in doing this he did, what he states he resolved to do, we see what he means when he says he resolved to become a "permanent resident" of the city of New York.

In this there is no doubt intimated of Mr. Wilson's sincerity. On the contrary, the more sincere he is, and the more confidently he insists that he was a resident of New York at that time, the more probable it is that his apprehension of the force and meaning of the terms employed in his affidavit is inaccurate, and that if he had explained in detail what he means by "permanent," and, "temporary," "home," and "residence," or rather if he had given us the particulars embraced in those words, instead of testifying in terms, which, if taken in their legal signification, dispose of the whole question upon his mere opinion, it might have appeared that his affidavit is not less inaccurate in other respects, by reason of similar mistakes in his judgment on the subject.

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He was then, a resident of Norwalk down to the time of his failure or embarrassment in business in the fall of 1857; and he was then admonished by a friend that he might be deemed a non-resident, and it was best to establish "the ostensible as well as actual character of his residence by unequivocal indications." It is doubtless true, that the motive with which a change of residence is made, is wholly immaterial, if the change be an actual change, with intent permanently to abide in the new location. But in weighing the evidence, and where there is a conflict of testimony and circumstances detracting from the evidence of the alleged change, the motive under which the party is acting, and the purpose he has in view, may properly be regarded in determining what was the actual intent.

The question we are considering is not whether, if he intended an actual "permanent residence" in New York, and in pursuance of that intent brought his family here; took possession of apartments here as his and their "only home," and occupied them without any intention to return to Norwalk when a temporary purpose was accomplished, that would make him a resident of this city? But the very question is, what was his intent in these respects, and what did he do?

He conveyed his farm and the chattels connected therewith to his son, and when he became embarrassed the deed was placed on record. But that farm has been as open to him and to his family, and has been as freely used as a home to him and them, according to his own affidavit, as it ever was before. Whether his wife's farm is still retained, or whether that is the farm referred to, is left in doubt by the affidavits.

He took rooms in October, 1857, at a hotel in this city, and with his wife and child, occupied them for three months, paying his bills weekly, but then gave up the apartments, and has not since had any permanent apartment in the hotel; nor does it appear, that he was in the city at all afterwards, until after one, if not two, of the attachments were issued which it is moved to discharge.

It is shown that his child was sick; and *that*, under the advice of his physicians, was a sufficient reason for taking him from the city. So, also, that Mr. Wilson was sick; and *that*, if he was too ill to be removed, was a very satisfactory reason for his not

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returning until sufficiently recovered. But it is not shown that his child continued ill—nor that he himself might not have returned, if in truth this was his home. Such continued absence would, however, under the circumstances, be far less significant if it were not, that, according to the tenor of his own affidavit, that of Mr. Hendrix, and that of his physician, it is apparent that it was because he had no motive to be here; either because he could not attend to business, or because his firm had suspended payment, and his presence in the city was not deemed so important as it had been on former occasions. And since the month of May, when he has been able to attend to his affairs, he has been merely an occasional transient lodger at the hotel—his family residing at Norwalk.

The indication is not slight, that the purpose under which his family were brought to the hotel, was to continue here only until the embarrassments of his firm had ceased, and with an expectation of their returning to Norwalk, or, if any more protracted stay was contemplated, that the design was abandoned some time before these attachments were issued; and that his subsequent visits to the city were only occasional and for purposes of business, while his actual residence was with his family at Norwalk.

There are other statements in Mr. Wilson's affidavit which tend strongly to support the motion for the discharge of the attachments, and it is doubtless true that if that affidavit is to be taken without qualification, and in the very terms therein employed, it would prevail.

Among the other statements, is one, that his wife and child returned to New York in March, and resumed the apartments they had before occupied. With what intent and purpose did they come? How long did they propose to remain? How long did they in fact remain? His affidavit does not inform us.

He states that when he and his family left in January, some of their personal property was left there. What property? How far did its character indicate an intention to return? His affidavit is silent on this subject. While another witness states that he gave up his apartments, and neither he nor his family have ever had any permanent apartments there since.

Is it usual for actual residents to have no house nor apart-

ments, by a tenure more permanent than to take and occupy from time to time such rooms, as happen at the moment to be vacant at a hotel? Probably we cannot say that it is not, and yet we cannot avoid the feeling of surprise, if it be so.

So, also, he states that it has long been his resolution not to occupy a house in New York, until he owned one, and he has conferred with several of his friends, and made efforts to obtain an eligible property in the city, wherein to have himself and his family permanently established. At what time, during the long period here mentioned, did he make these efforts? Was it before he went to Norwalk to reside? With whom did he confer? What were the efforts which he made? And did he even in fact intend to purchase a house here, and if so, when did he have such an intention?

It would seem strange that, in relation to a fact so important as this on the question of a change of residence, some, at least, of these particulars have not been disclosed.

The review thus given of the affidavit of Mr. Wilson may, perhaps, be deemed minute and critical. But it should be borne in mind that this is the main affidavit upon which the motion is founded—the motion is a very important one to all the parties—the affidavit comes from one who knows all the facts, and some of the facts stated relate to the operations of his own mind, and it is reasonable to expect, under such circumstances, and especially when a severe contest might well be anticipated, a statement less liable to abatement in the particulars above referred to.

We do not think it necessary to give a recital of the details found in the numerous affidavits read in opposition to the motion. They tend to show the habits of Mr. Wilson, not only down to 1857, but since; down to the time when the motion was noticed, bearing on the question of residence, and without apparent change in that respect.—The belief of his neighbors and acquaintances in Norwalk founded thereon, or derived from their acquaintance with him.—The efforts made to find him in this city.—The apparently transient character of his lodging at the hotels here, from time to time.—The general reputation at Norwalk induced by his habitual actual presence there, as in former years.—The action of the public officers there based upon all the circumstances. And other particulars of less moment.

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On the other hand, Mr. Wilson is corroborated, in some particulars of an opposite tendency.

Without entering into any further detailed discussion of the particulars of these affidavits, it must suffice to say that, upon a careful examination of all the affidavits, we are not satisfied that the conclusion of the Judge, at Special Term, that, as matter of fact, Mr. Wilson was a resident of the State of Connecticut when these attachments were issued, was clearly wrong.

The controversy is rather about facts than about the legal principles involved. As to the meaning of the term residence, or non-residence, in reference to this motion, we think there is no ground for difference.

We are sitting as an appellate tribunal, upon a question of fact arising on conflicting affidavits and doubtful circumstances. We should not reverse an order, unless clearly satisfied that the finding of the Judge was wrong. We incline rather to the opinion that, sitting as jurors and acting under instructions touching the law, such as we deem the law to require, we should come to the same conclusion.

The order should be affirmed.

PIERREPOINT, J., dissented: All the other Justices concurred in the opinion of Mr. Justice WOODBUFF.

Order affirmed, with costs.

CHARLES SQUIRE, Jun., v. CHARLES M. YOUNG.

A proceeding instituted under § 292, of the Code, can be terminated as absolutely by the plaintiff's abandonment of it, as by an order of the judge before whom it was commenced.

In this case, the day to which it was last adjourned, either by the judge or by the consent of the parties, was the 9th of July, 1857. On that day the plaintiff neither moved the matter before the judge, nor called his attention to it, nor did he again move in the matter until the following October. On the 16th of December, an order was made, based on the original order (granted on the 11th of March), and on an examination of the debtor, and of a witness had on the 17th and 24th of April, appointing a receiver of the debtor's property.

Held, that the order of the 11th of March, and the proceedings had thereon, must be

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deemed to have been absolutely abandoned and terminated, and that the subsequent order of the 14th of December was unauthorized and erroneous. In proceedings, under chap. 2 of title 9, of the Code, the judge can exercise no powers except such as it confers, either in express terms, or by necessary implication.

(Before BOSWORTH, CH. J., and HOFFMAN, SLOSON, WOODRUFF, PIERREPONT, and MONROE, J. J.)

Heard, December 4th; decided, December 30th, 1858.

THIS is an appeal, by the defendant, from an order made by Mr. Justice HOFFMAN (in proceedings supplementary to execution), on the 16th of December, 1857, appointing a receiver of the property of the defendant. On the 11th of March, 1857, the said justice made an order requiring the defendant to appear before him on the 18th of that month, "and on such further days as the Court, or referee duly appointed, shall name, to make discovery on oath concerning his property."

On the 18th, it was discovered that \$39,54 was due to the defendant from S. S. Mangan, and by consent of the parties it was paid to and received by James Clinton Bolton (defendant's attorney), "to be held by him until the final determination of the said proceedings, or until the further order of the Court in the premises," and Mr. Bolton signed a receipt, entitled in the action, stating that fact, and that he had received "the said sum of \$39,54 as the agent and attorney of the parties to this suit."

Proceedings were adjourned from time to time, until the 17th of April, 1857, when the defendant was examined, and disclosed that he had another small claim against a third person, which latter claim, it was agreed, should be held on the same terms as the \$39,54.

An adjournment was then had until the 24th of April, when a witness was examined. Proceedings were then adjourned from time to time, by a judge of the Court, until the 18th of June, 1857. On the 17th the defendant and plaintiff's attorney, by agreement between themselves, extended the adjournment until July 9th.

On the 18th of June, defendant's attorney attended before the judge, and not knowing of the agreement made on the 17th, obtained from Mr. Justice Hoffman an order, vacating the order of March 11th, and declaring it to be of no further force and effect.

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On the 9th of July the defendant did not attend before the judge, nor was the matter moved before him by any one on the part of the plaintiff. A Mr. Freeman, on behalf of the plaintiff's attorney, had the defendant called by an officer of the Court, in the room in which the judge at chambers was sitting. But even this fact was not called to the attention of the judge—neither the defendant, nor any one in his behalf, answering when the defendant was called; Mr. Freeman left.

Early in October, the plaintiff's attorney, on being informed of the granting of the order of the 18th of June, moved before Ch. J. Duer for an order that the defendant attend and be further examined under the original order of March 11th; and Ch. J. Duer denied the motion, on the ground, as is alleged, that if the plaintiff could have any relief, it could be granted by Judge Hoffman only, on an application to him.

On the 18th of November, 1857, the defendant obtained from Judge Hoffman an order to show cause, &c., and on the hearing upon such order the judge vacated the order of the 18th of June, but denied plaintiff's motion, that the defendant attend and submit to a further examination, or that he show cause why he should not be punished for a contempt; and by consent of parties, designated the 5th of December as a day on which he would hear the plaintiff on the question whether "the payment over of the moneys alleged to have been discovered upon the examination or examinations heretofore (theretofore) had" should be ordered.

On the 14th of December, 1857, he denied that motion, "without prejudice to any action by a receiver to recover the same," and granted an application, then made, to appoint a receiver. The order, appointing a receiver, was signed on the 16th of December, 1857, and having been duly entered, the defendant appealed from it to the General Term.

James Clinton Bolton, for appellant.

S. B. Brownell, for respondent.

BY THE COURT. BOSWORTH, CH. J.—An order, made by a Judge of the Court, under § 292 of the Code, requiring the defendant "to appear and answer concerning his property, before

such Judge, at a time and place specified in the order," and forbidding (by § 298), "a transfer or other disposition of the property of the judgment debtor; not exempt from execution, and any interference therewith;" will not continue in force, as a matter of course, until it is formally vacated by another order of the Judge, if the plaintiff should fail to have it adjourned from time to time, or to move in respect thereto, on the return day of the order, or on an adjourned day, before the Judge who granted it.

When such an order is obtained and served, if the plaintiff should *designedly* omit to appear before the Judge on the day, and at the place named, we think he must be deemed to have abandoned the proceeding, and that his voluntary failure, to move the matter before the Judge on that day, will operate as a discontinuance of it, although no order should be made vacating the proceedings.

If such a consequence would result from a conscious and intentional omission of the moving party to attend on the return day of the order, then it would seem to follow, that the result would be the same, whatever the cause of his non-attendance. We think it cannot justly be held, that if his non-attendance was voluntary, the proceedings are thereby determined, but if it was involuntary or inadvertent, they will not be determined until an order is made, declaring them vacated.

So too, when the examination of a judgment debtor has been completed, if no motion is thereupon made to the Judge, but on the contrary, both parties leave without an adjournment; or the appointment of a receiver being applied for by the judgment creditor, the proceedings must be deemed to have been then abandoned.

If this be not the correct view, then it would seem to follow, that the proceedings must be treated as pending, until they have been formally vacated by order. Such a construction would treat this proceeding as if it were an action, and as operative and continuing until determined by order. The remedy given by § 292 was designed to be summary. The order which it authorizes is a proceeding in the action. It was designed to enable a judgment creditor to obtain promptly, a discovery of the debtor's property, and an application of it upon the judg-

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ment. It is found in Chap. 2 of Title 9. That title is, "of the execution of the judgment in civil actions"—and Chap. 2 is entitled, "Proceedings supplementary to the execution."

To hold, that at the end of several months after an adjourned day, and after any appearance of the creditor before the Judge upon the proceeding, that it continues in force provided no order vacating it has been made, would be treating it as an action, and might operate unjustly to the debtor, and to his other creditors.

If an operative proceeding, in the case last supposed, the defendant, if he should dispose, after the lapse of two or three months from the last adjourned day, of any little items of property he may have had when the original order was served, could be punished for a contempt, because he had disposed of some of his property contrary to the prohibition contained in such order. If, in such a case, he could not be punished for a violation of the injunction, we think a receiver of his property could not be appointed. We cannot think, that in such a case, the original order is so far operative as to continue the proceedings in force for some purposes, unless it keeps them in force for the purpose of all the remedies, to which the creditor might resort while they were continued by regular adjournments.

So too, if, in this case, another judgment creditor of this defendant had instituted similar proceedings in September, and had discovered property which belonged to the defendant on the 11th of March, the present plaintiff would have the benefit of such discovery, if his proceedings are to be treated as pending, notwithstanding his neglect to move in them, on or subsequent to the 9th of July.

In *Edmonston v. McLoud*, 16 N. Y. R. 543, one Stiney, a judgment debtor, was served on the 4th of December, 1850, with an order obtained on the 2d, requiring him to appear on the 6th. Stiney did not appear, and the plaintiff did nothing on the 6th under his order, except that he obtained an attachment which could not be served, as Stiney had left the State! On the 30th of December, the defendant, who owed Stiney \$800, when the order of the 2d of December was served, with full knowledge of all the facts, paid the \$800 to Stiney's wife.

HARRIS, J., remarks, "But these proceedings," (the proceedings on the order of the 2d of December), "were abandoned by

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the plaintiff, and it is now too late for him to derive any benefit from them."—Id. 545.

We think it quite clear, that such proceedings can be, as effectually, terminated by the creditor's abandonment of them, as by a formal order of the Judge before whom they were commenced.

If the order appealed from is regular and valid, as a proceeding based upon the order of the 11th of March, we think that, by relation, it vests in the receiver all the property the debtor had on that day. If that be the correct view of it, then, it would seem to follow, that the receiver can, as such, recover of Mr. Bolton the \$39,44, mentioned in his receipt, although he may in perfect good faith have paid it, in August or September, to some creditor of the defendant, by his direction.

We think the only just conclusion, from the facts before us, is, that these proceedings have been effectually terminated by the plaintiff's abandonment of them, and that the Judge, who made the order of the 11th of March, had no authority or power, by reason thereof and of the subsequent proceedings had thereon, to grant an order, upon the motion made before him in November, appointing a receiver of the debtor's property.

We see no alternative, between holding the proceeding to be an action, which will be depending from the time it is commenced until it is terminated by an order of the Judge; or a statutory proceeding, which will cease to be operative whenever the party instituting it fails to appear and move in it, on any day to which it may have been adjourned.

The Code defines an action, and this proceeding does not fall within that definition. (Code, § 2.)

Chap. 2 of title 9 of the Code enables a judgment and execution creditor to obtain the examination of his debtor, and of third persons indebted to the latter, or holding property which belongs to him, and of witnesses. This examination is permitted, to enable the creditor, summarily, and without action, to obtain an application of the debtor's property to pay the judgment, either by an order of a Judge of the Court, or of a county Judge directing such application, or through the intervention of a receiver to be appointed by such officer. It is not a proceeding had in Court, but it is had before a Judge out of Court. It is

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not a proceeding incident to the action. It is wholly a creature of the statute. No authority is given to the Judge to revive or continue it, if the creditor fails to appear on the day at which the original order is made returnable, or on any day to which he may have adjourned it.

When such a failure of the creditor occurs, we think his proper course is to obtain a new order, on an affidavit conforming to the Code and excusing his previous neglect or default. In the proceedings on such order he will be restricted, as a matter of course, to such relief as it would be proper to grant, if the prior proceeding had not been instituted. He can reach only such property as the debtor has when the new order is served, unless the debtor has previously disposed of his property fraudulently: In that event it may be recovered by a receiver, to be appointed by the Judge.

In proceedings under chap. 2 of title 9 of the Code, the Judge can exercise no powers except such as it confers, either in express terms or by necessary implication.

To hold that such proceedings, when once commenced, will continue operative until formally vacated by order, and that, too, although the creditor fails to appear on the return day, or on an adjourned day, or to move in the matter for months or for years thereafter, is giving a character and effect to them not declared by the Code, and in nowise necessary to the execution of all, or any, of the powers it expressly confers.

Cases of apparent hardship may arise, as they occasionally do, in actions themselves: Such cases, if of frequent occurrence, and involving considerations of importance, may be addressed to the Legislature, as inducements to amend the law. The Courts can only administer the laws as they are enacted. They cannot legislate, to meet the exigencies of cases of hardship or misfortune. Whenever they attempt it, they furnish new illustrations of the maxim: that hard cases make bad precedents.

To avoid misconstruction, it is proper to remark, that we must not be understood to deny the power of the Judge to appoint a receiver of the debtor's property, or to punish him, as for a contempt, if he disposes of his property, contrary to the injunction, provided the proceeding has been continued by adjournments agreed upon, in writing, by the parties, although not ordered by

Addendum.

the Judge: No such question is before us on this appeal. At the same time, we think it more prudent, that all adjournments should be made by order of the Judge.

Without discussing further the questions presented by this appeal, the order in question, for the reasons already stated, must be reversed.

But as the question is new, and as the loose practice pursued has given rise to views in relation to these provisions of the Code, which we think no one would entertain on a reading of them, however careful, no costs of the appeal will be allowed to either party.

Order reversed, without costs to either party.

ADDENDUM.

NOTE of decisions reported in the 17th Volume of the *New York Reports*, in cases carried by appeal from the Superior Court of the City of New York to the Court of Appeals. (That volume was published the last of December, 1858, after the stereotyping of this volume had been commenced.)

Dunham and Dimon v. Waterman, Heckers, and Rowell, P. 1 (S. C. in 3 Duer, 166). The Court of Appeals held the statement insufficient to authorize the entry of a judgment under §§ 282 and 283 of the Code: That the assignment in question was void on its face; overruling *Cunningham v. Freeborn* (11 Wend. 240), in the Court of Errors, and reversing the judgment of this Court, which conformed to it.

Mayor, &c., of New York v. Stuyvesant's Heirs. P. 84. Judgment of the Superior Court affirmed.

Pendleton v. Weed. P. 72. Judgment of the Superior Court affirmed.

Russell v. The Hudson River Railroad Company. P. 184.

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(S. C. 5 Duer, 39.) Judgment of the Superior Court reversed: The Court of Appeals *held*, that a laborer employed by a railroad company to work on the line of the road, in connection with a gravel train of cars, under an arrangement by which he was to be conveyed from the city of New York every morning, and back to the city to his home every night, in such cars, free of charge, cannot maintain an action against the company for an injury sustained while thus riding home, in consequence of the negligence of the engineer: the Superior Court *held*, that the relation of employer and employee had ceased, for the day, before the accident, and that at the time of the injury the laborer was being carried home by the defendants, in pursuance of their contract in that behalf: In the view taken of the case by the Court of Appeals, the laborer, from the time of leaving the city in the morning until his return to it at night, should "be regarded as having been, during the entire interval, the servant of the company, and bound as such to render aid, if necessary, in promoting the passage of the train, both to and from the city."

Van Wyck v. Aspinwall. P. 191. (S. C. 4 Duer, 268.) Judgment of the Superior Court affirmed.

Hull v. Carnley. P. 202. Judgment of the Superior Court affirmed.

Harris v. Pratt. P. 249. (S. C. 6 Duer, 606, under the title, *Harris v. Hart.*) Judgment of the Superior Court affirmed.

Weed v. The Panama Railroad Co. P. 362. (S. C. 5 Duer, 193.) Judgment of the Superior Court affirmed.

Grosvenor v. The Atlantic Fire Insurance Company. P. 391. (S. C. 5 Duer, 517.) The Court of Appeals overruled *The Traders' Insurance Company v. Robert* (9 Wend. 404), and *Tillou v. The Kingston Mutual Insurance Company* (1 Seld. 406), and reversed the judgment of the Superior Court, which conformed to them. See note to *Grosvenor v. The Atlantic Insurance Co.*, *ante*, p. 469.

Kernochan v. The Bowery Fire Ins. Co. 429. (S. C. 5 Duer, 1.) Judgment of the Superior Court affirmed.

Addendum.

Oddington v. Gilbert. P. 489. (S. C. 5 Duer, 72.) Judgment of the Superior Court affirmed.

Mellen v. The Hamilton Fire Insurance Company. P. 609. (S. C. 5 Duer, 101.) Judgment of the Superior Court affirmed: Both Courts *held*, "that the assignment of a policy of insurance after a loss, is not within the clause prohibiting a transfer without the consent of the insurers. The restriction is upon an assignment during the pendency of the risk, and not of a transfer of the debt arising from a loss.

"As a matter of law, an unexplained delay, for twenty days, to notify insurers, residing in the same city with the insured, of a subsequent insurance, is unreasonable, and avoids a policy which required such notice to be given with reasonable diligence."

The Court of Appeals—all the Judges, except ROOSEVELT, J., concurring—affirmed the judgment, for the reasons stated by CH. J. DUER in his opinion, delivered on announcing the judgment appealed from: That opinion is reported in 17 N. Y. R. 615, as expressing the reasons of the Court of Appeals for affirming the judgment.



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A

ACTION.

1. The plaintiff was employed by the firm of H. C. Seymour & Co., of whom the defendants are the survivors, to procure for the firm from the directors of a Railroad Co. authorised to construct a railroad from Cincinnati, Ohio, to Illinois town, Illinois, a contract for building the road, and agreed to pay him for his services, should he succeed in obtaining the contract, the sum of \$10,000. The plaintiff concealed his own agency, and the contract was obtained through the influence, with the directors of the company, of third persons employed by the plaintiff, and acting for a pecuniary reward. He claimed in this action to recover the \$10,000 with interest, which the firm of H. C. Seymour & Co. had stipulated to pay him.

Held, upon a full examination of adjudged cases, that the contract, upon which the action was founded, if not in its terms, yet from the nature of the means that were used to influence the action of the directors of the Railroad Co., by an agent of the plaintiff, was an agreement, which, as contrary to morality and public policy could not be enforced. *Davison v. Seymour.* 88

2. An existing valid cause of action, in favor of the plaintiff, against the defendant, is not discharged or waived by an offer of the plaintiff to permit the defendant "to use" the amount due to the plaintiff thereon, if it will enable the defendant "to carry a trade through," made between the defendant

and a third person, without other assistance from such third person, though such cause of action accrued and the amount, the use of which is so offered, is due, for services of the plaintiff, as broker, in negotiating the trade alluded to in such offer. *Merriess v. Bingham.* 166

3. The acceptance of such offer by a letter which states in substance that, the defendant on consummating the trade, will keep back a part of the property in which, by the terms of the trade, payment by him to such third person was to be made, "to supply any deficiency," in connection with such offer, imports that the offer was an offer of the use of the amount, due from the defendant to the plaintiff, temporarily, and not a gift or waiver of it, and that it was not made to induce the defendant to modify his contract with such person, and submit to terms to which he might not otherwise assent, on condition of being exonerated from such claim of the plaintiff. *Id.*

4. When an owner of property, at the time encumbered, assigns it to another on his agreement to pay the encumbrance and sell the property, and, after satisfying his advances and disbursements in that behalf, to pay to the assignor one-half of any surplus left, and of any profits made by the use of the property in the meantime, and finally, the two agree upon the sum to be paid to the original owner, in satisfaction of his interest and claims, and such assignee then sells and transfers such property, subject to such original owner's claims thereon and interest there-

on, and such second purchaser agrees to pay the sum so adjusted and agreed upon, and he subsequently transfers the property to a third purchaser, who does not agree to pay it, but subject expressly to such claim, and the third purchaser sells it to a fourth, subject to such claim, and who also agrees to pay to the original owner the said sum so agreed upon; an action may be maintained by the original owner against all of said defendants, to have the property sold and the proceeds applied to pay the sum so agreed upon, and in default of the said amount being realized from the property, to collect from the said first and second purchasers, in the order of their liabilities, the amount of the deficiency. *Ford v. David*. 569

5. In such an action the original owner may have judgment against the first and second purchaser severally for the amount so agreed upon, upon their promise to pay it. But he can have no such judgment against the third purchaser, as he did not personally promise to pay, nor against the fourth purchaser, as his promisee was under no personal liability to pay. *id.*
6. On such a state of facts, the claim to have the sum so agreed upon declared a lien upon the property, and ordered to be paid out of it by a sale of the property, and such an application of its proceeds, is a single cause of action. The several liabilities of such purchasers are collateral matters, and may be enforced to make good any deficiency resulting from a sale of the property. *id.*

Vide SURETY, 1, 2, 3.

Ante, 436 and 490.

ESTOPPEL, 1, 2, 3.

INSURANCE, 29 and 31.

PRACTICE, ABATEMENT, 4.

ADDENDUM.

Vide ante, 697.

AGREEMENT.

1. When a written agreement has been duly made by and between two joint stock Express Companies (which they were competent to make) for the consolidation of the two companies and the

merging of one of them in the other, by which agreement the one to be merged agrees to buy 2000 shares of the increased stock of the other, and which stock such other agrees to issue and sell for \$200,000, and by which the stockholders of the one to be merged are to have the right, *inter alia*, of becoming purchasers of such 2000 shares, in proportion to the amount of stock they hold in the company to be so merged, or to relinquish their stock to the company of which they are members and receive therefor such sum as they have paid on account of their subscription for the same and ten per cent. in addition thereto; and the company to be merged, on the making of such agreement, through S., its President, notified all of its stockholders of such agreement and of its provisions, and in such notice offered to each of them, his election of either of the several provisions made, by such agreement, for the benefit of such stockholders, and E., one of such stockholders, on the receipt of such notice and offer, wrote a letter to S. as such President, inclosing in it E.'s certificate of stock (being the only evidence he had of any right to stock in such company), and by such letter declared that he declined to become a purchaser of any part of said 2000 shares, and that he elected to take the amount he had paid on his subscription for such stock, and ten per cent. in addition thereto, *held*, that, the election tendered to E., by S., on behalf of the company of which he was such President, and the letter sent by E. to S. with the declaration of his election thereby communicated, was an offer by S. (on behalf of said company) to receive back E.'s certificate and pay him therefor, which, on being accepted by E. (by declaring his election to surrender his stock-certificate, and receive the sum so offered to be paid), became a binding contract, irrevocable, except by the mutual assent of E. and of the said company, as the parties to such contract. *Butterfield v. Spencer*. 1

2. *Held* also, that, G., to whom S., as such President, on the day of, and after the receipt of E.'s said letter, sold the stock which E. so declared his election to surrender (G. having bought and paid for the same in good faith), acquired a valid title to such stock as between himself and E. and as between himself

- and the plaintiff, who, subsequent to G.'s said purchase, took from E. an assignment of said stock-certificate and of E.'s rights as a stockholder in the said company. *id.*
3. It was also *held*, that, the fact that S., after offering to sell such stock to G., returned said stock-certificate to E., with a request that he would sign an endorsement written by S. thereupon, in these words, viz.: "I authorize and require Charles C. Backus, Treasurer of the U. S. Express Company" (the Company to be merged), "to cancel the within receipt, and to issue, in its place, a new receipt for the same to such persons as Hamilton Spencer may direct"—, and then return it to S., did not give and could not be regarded as having been intended to give, to E. a right to renounce the election he had made, or to treat the matter as opened for further negotiation: *id.*
4. *Held* also, that, S. having, under such circumstances, sold the stock to G., and the latter having paid for it, to the company of which S. was President, and the company having adopted the sale, and continuing to insist upon its validity, it did not lie with E., or the plaintiff as his assignee subsequent to such sale, to deny the authority of S. to make it. *id.*
5. Also *held*, that, although the consolidation agreement required S., within 24 hours after being notified by any stockholder of the company to be merged, of his election to surrender his stock, and that he declined to be a purchaser of any of the said 2000 shares, to give the like notice, in writing, to the trustees of the other company (who were named), and who agreed that, on that being done, they would take and pay for the stock of such declining stockholder, yet, whether S. neglected his duty, in not giving notice to said Trustees, in the manner and within the time prescribed by said agreement, of E.'s said election, is a question between such trustees and S. or the company of which he was President, and that its just determination did not affect the rights or liabilities of E., growing out of his acceptance of the offer made to him by the company of which he was such stockholder. *id.*
6. *Held* also, that, after such sale to G. of, and payment by the latter for, such stock as aforesaid, E. could not retract his said election and hold the stock, even though it was satisfactorily proved that a conversation was subsequently had between E. and S. at Rochester, in which E. avowed a purpose to retain the stock, and S. expressed his gratification thereat, saying at the same time that the condition of the stock had not been changed since E. had declared his said election, and could not be, until S. returned to New York; and hence, also *held*, that it was of no importance that the statement of the facts found by the judge who tried the cause, did not show whether he concluded such conversation to be what E. swore it was, or what S. swore it was; (their testimony in relation to it being in conflict.) *id.*
7. It was also *held*, that the plaintiff who purchased from E. the stock-certificate he held and his rights as a stockholder, after the transaction between S. and G. had been fully concluded, stands in no better situation than E. would have done, and did not thereby acquire any rights superior to those which E. possessed, at the time of such purchase by the plaintiff. *id.*
8. *Held* also, that the plaintiff by inquiring of E., at the time of such purchase, why the unsigned endorsement, or power of attorney, was written on the back of said stock-certificate, and by being informed by E., in answer to such inquiry, "in substance of the reason why it was there," acquired a knowledge of facts, and of acts of E., which concluded E., and divested him of the power to reclaim the stock, and consequently that the plaintiff, as such purchaser, acquired no right to become a purchaser of any of said 2000 shares of stock, or to have any of it issued to him. *id.*
9. When, by a written agreement, the parties to it "bind themselves" to perform it, and do not by its terms nor by implication bind any other person, they are personally liable to do or cause to be done, and to pay what they stipulate shall be done and paid, although they are in truth acting on the behalf or for the benefit of others: If in such an agreement they designate themselves as a committee of management, such designation will be regarded as a de-

scriptio personarum. Rowland v. Phalen. 43

10. When by such an agreement, one of two parties promises to pay money, the natural construction is, that the other party is to receive it, unless the agreement otherwise provides. When, by the agreement, the parties stipulate that a sum named shall be paid in weekly instalments, not saying by whom they shall be paid, and that "a further sum" shall be paid by the parties of the second part, and especially when the consideration of the whole contract moving from the other party is to be delivered to and received by said parties of the second part, the true construction is that, the last named parties personally undertake to pay such instalments as well as the "further sum." And the party of the first part is the person to receive all of such payments, when the agreement neither specifies any other person as the one to whom either of such payments is to be made, nor fairly imports that some other person is to receive them. *id.*

11. A stipulation in such an agreement that, "a further sum of five thousand dollars, as an indemnity to Isaac Jacobsohn, is to be paid in two notes of equal amounts, at six and eight months, by the parties of the second part," imports, for the same reasons that, the party of the first part is the person entitled to receive the notes. *id.*

12. Such agreement declaring that, the party of the first part is "acting in behalf of Isaac Jacobsohn & others, interested in the contracts and engagements of sundry artists recently introduced into this country through the medium of Messrs. Ullman and Strakosch," and by it, the party of the first part stipulating and obligating himself, "that, the artists above named are to be transferred and the contracts assigned to the parties of the second part for the term of two months," the whole scope and obvious meaning of such agreement indicate that, the plaintiff (whether with or without authority) assumed to act on the behalf of Jacobsohn & others not named, and to bind himself personally to accomplish certain results beneficial to the parties of the second part, in consideration of their agreement to pay to him for the benefit of those for whom

he acted, the money and notes stipulated for. In this aspect of the agreement, he is "a trustee of an express trust," as defined by § 113, of the code, and may sue in his own name, without joining with him those for whose immediate benefit the action is prosecuted. There is, therefore, no defect of parties, by reason of not making them parties to the action. *id.*

13. If, under such an agreement, a delivery of the two notes to Jacobsohn would satisfy it *quoad hoc*, it is matter to be pleaded by way of defence, and the complaint need not aver that they have not been so delivered, in addition to an allegation that the plaintiff (the party of the first part) has duly demanded them, and that the parties of the second part refused to deliver them. *id.*

14. It is not essential to a sufficient complaint, on such an agreement, that the plaintiff should allege that he had authority to make such a contract. The personal obligations which, by it, he assumes, constitute a sufficient consideration to uphold it. *id.*

15. An averment, in a complaint on such an agreement that, "he, (the party of the first part), and those on whose behalf the said agreement was made and entered into by him, have fully and faithfully performed and fulfilled all, and singular the covenants, and agreements, in the said agreement contained, on the part of the said plaintiff and those on whose behalf the said agreement was made and entered into by him as aforesaid," is, under § 162 of the code, a sufficient allegation of the performance of the conditions, precedent to his right to demand the stipulated payments. *id.*

16. The fair meaning of that section is, that it may be stated generally that, the person or persons, by whom the conditions were to be performed, have duly performed, &c. But the plaintiff being a party to the suit and to the contract, an averment that he has fully and faithfully performed, &c., is an averment that every thing was done which he was bound to do or cause to be done. *id.*

17. The clause, by which the parties

agreed "to execute a legal instrument, in due form of law," &c., &c., cannot be so construed as to make the agreement actually signed merely mean that, by it the parties incurred no obligation except to execute such further instrument; as all the rights and obligations of the parties were settled and defined by the one they did execute. Although the complaint designates distinct parts of it as further causes of action, such designation may be disregarded, when it appears on the face of the complaint itself, that in truth they are only distinct and several breaches of the agreement copied into the complaint. Therefore, a demurrer cannot be sustained to any one of them, as not stating facts sufficient to constitute a separate and distinct cause of action. *Id.*

18. The making of the agreement and performance thereof by the plaintiff being once stated, the several allegations, of the breaches thereof by the defendant, may be regarded as distinct grounds of recovery rather than separate and distinct causes of action, and these breaches may properly be stated without repeating, before each breach, the averment of such making and performance by the plaintiff. *Id.*

19. A contract of sale for the delivery of goods on a future day is valid in law, although the goods at the date of the contract are not in the possession, nor within the control of the seller. *Cascard v. Hinman.* 207

20. Although such a contract may be valid on its face, yet, if it was the intention and understanding of the parties when it was made, that the goods should not be delivered, but that the difference between the market price on the day of delivery and that stipulated in the contract, should be paid by one of the parties to the other, according as such market price might exceed or fall short of that stipulated, the contract is not a legitimate mercantile speculation, but is a mere wager, and as such is void under the 8th section of the act "of betting and gaming" (1 R. S. p. 662). Whether such was the intention of the parties is a question of fact, which in an action for the breach of the contract, in which a defence under the statute is set up, must be determined by the jury upon extrinsic evidence. The admis-

sion of such proof is not a violation of the rule that forbids the introduction of parole evidence to contradict or vary the terms of a written agreement. *Id.*

21. The plaintiffs, at New York, in June, 1846, shipped to the defendants, at Liverpool, 5,000 bbls. of flour, per "N. Biddle," and 3,000 per "Georgianna," for sale, and by letter of June 25th, 1846, said, "You will please make no disposition until we give you our wishes, per 'Caledonia,' unless 22s. in bond is attainable, in which case, if, in your judgment, you deem it our interest to accept that sum, please to do so." On the 27th of June, 1846, per steamer "Caledonia," the plaintiffs wrote to defendants thus: "We fear the first introduction for consumption may tend to continue low prices, as they will probably be large immediately on the passage of the new bill." (Meaning, by the new bill, the British Corn Law Bill, reducing the duties on foreign breadstuffs, then before Parliament, which received the royal assent on the 27th of June, and went into operation three days after.) "Believing that after the stocks now in bond shall have been reduced by consumption, &c., that an improvement may ensue, we would express our desire that these parcels may be withheld from the market, until the operation of the new law shall have produced its results. We hope we may not err in assuming its passage; though, if 22s. in bond is attainable on arrival, and you think our interest dictates such sale, please so dispose of it." The defendants received this the 12th of July. *Milbank v. Dennistoun.* 246

By a letter of the 31st of July, and received by the defendants on the 12th of August, 1846, the plaintiffs say: "We suppose that ere this the crop of wheat has been ascertained, as to its probable yield, and the grain and flour conformed to such result. We therefore ask you to exercise your discretion in effecting sales for us." On the 4th, 5th, and 7th of August, 1846, the defendants sold the "N. Biddle" flour, at prices which produced \$2.17 per bbl. net, being out of bond, and the duties on it having been paid. *Id.*

The defendants advised the plaintiffs of such sale, by a letter dated the 18th of August, 1846, in which letter the de-

defendants said that,—“After writing you on the 3d inst., we were induced, by the continued fine appearance of the season, to sell your flour by the ‘Nicholas Biddle’ at 21s., as per note above; and this we now regret, as on the 11th or 12th inst., a great change took place in the weather, and the potato crop was completely blighted.” *id.*

The flour, per the “Georgianna,” being of the same quality, was sold at later periods, and at prices which would have made the flour, per the “N. Biddle,” produce, with interest to the day of trial, \$14,530.29 more than the plaintiffs realized from it. In an action to recover this sum as damages, on the grounds that such a loss had been sustained by reason of the defendants disobeying the orders given to them, and by reason of their negligent performance of their duty, as such factors and agents, it was *held*, *id.*

22. 1.—In determining the question, whether the defendants violated their instructions, in selling at the time they did, the letters of the 25th and 27th of June are the only letters to be considered, to ascertain the precise instructions under which the defendants were then acting, as they had then received no others which gave any. *id.*

23. 2.—The letter of the 27th of June is not fairly susceptible of two interpretations, and it is the duty of the Court to construe it, and declare its meaning. *id.*

24. 3.—As 22a., in bond, could not be obtained, on arrival of the flour, it was the duty of the defendants to withhold the flour from market until the stock in bond, on the passage of the Corn Law, had been reduced by consumption, &c. If it was sold before that, it was sold before the defendants were authorized to sell, and they are liable for the consequences of that act. *id.*

25. 4.—It was the right and duty of the defendants, after the stock, then in bond, had been introduced into the market, and had been reduced by consumption, &c., to determine, in the exercise of good faith, and of proper care and diligence, whether, and when, the Corn Law had produced its results, and also to determine, thereupon, when their duty and the interests of the plaintiffs

required them to sell, acting under such instructions. *id.*

If they did not sell until after such introduction and reduction, they are not liable, unless they failed to exercise the care and diligence which a prudent consignee, acting on his own account, and with the knowledge or information which the evidence shows they possessed, would have exercised. *id.*

26. 5.—If they failed to exercise that care or diligence, or disobeyed their instructions, as above explained, in selling before the change in the market, of which they speak in their letter of the 18th of August, they are liable. If they did not do either, they are not liable. If they did do either, they are liable. *id.*

27. 6.—After the change in the market, mentioned in that letter, it was their duty to act with reference to the interests of the plaintiffs; as they would be affected by that change and the causes that produced it. *id.*

28. 7.—Under the letter of the 31st of July, and received on the 12th of August, 1846, the defendants were bound to exercise good faith, and reasonable care and diligence—such care and diligence as a consignee, of ordinary care and prudence, not coerced by any necessity to sell, and acting on his own account, would have exercised under the same circumstances. Whether they exercised such care and diligence, was a question of fact, to be determined by the jury. If they failed to exercise it, in selling when they did, they are liable. *id.*

29. 8.—To ascertain the damages which the defendants are liable to pay, if liable at all, the jury must, upon a consideration of all the evidence bearing upon the questions, at what time the market prices began to advance, what continued to be the tendency of prices, and what must have been the views of men of prudence, having such information as the defendants had, and acting with reasonable care and diligence, as to the time when this flour might have been sold, without justly incurring the imputation of having acted without reasonable care and diligence, ascertain *that day*, and then determine what price could have been obtained for it

at that time, in selling it in the usual mode, and in the exercise of proper care and diligence. The defendants should be charged with that price, and be credited with advances made and charges paid, and the further expenses that would have accrued, and interest on them, to the time when the price of the flour would have been realized by them. The balance, with interest to the time of the verdict, is the sum the plaintiffs are entitled to recover. *id.*

30. 9.—The jury having found, under a question specially submitted, that the defendants, in selling at the time they did, failed to exercise that care and diligence which prudent consignees, having the information which the defendants then had, and acting on their own account, would have exercised, it was also held, that the variance between the fact found, and a declaration which, in addition to alleging a disobedience of orders, also averred that the defendants acted "carelessly, and negligently, and inattentively, sold prematurely, and for less than they could have obtained, if they had faithfully performed their duties," was immaterial, inasmuch as the act of April 11, 1849, (Laws of 1849, p. 706, § 2, Sub. 1) applied sections 169 to 176 of the Code, inclusive, to future proceedings in civil actions which were pending when the Code took effect. *id.*

31. On the 7th of April, 1855, the plaintiffs, (then being in expectation of receiving a large quantity of French walnuts, by the ship, Helen E. Miller, which ship was, at that time, on her passage from Havre, in France, to the port of New York), contracted to sell to the defendants who agreed to buy, "twenty-five bales of French walnuts, at 7 cents per lb., to arrive per Helen E. Miller, less 3 per cent. cash." *Cleu v. McPherson.* 480

32. *Held*, that said contract was executory, and that the plaintiffs, by its true import and meaning, undertook that, the walnuts should be merchantable, and in quality, substantially such, on their arrival and on the tender of them to the defendants, as are known in the trade, as French walnuts. *id.*

33. The jury having found, in answer to questions specially submitted to them,

that, the walnuts in question, when they arrived and were tendered to the defendants, were not merchantable as French walnuts, and were then worth only two and one half cents per pound, and that the article known in the trade as French walnuts, in the condition in which they generally arrive in the New York market, was worth at the time of said arrival and tender, six and a half cents per pound, it was also held that, the defendants were under no obligation, by reason of their said contract, to receive and pay for the walnuts so tendered to them by the plaintiffs. *id.*

34. The expressions, "The article undefined," "not defined," and "undetermined," commented on by HOFFMAN, J. *id.*

Vide ACTION, 1, 3; and ante, 436 and 449.

ALIENATION, SUSPENSE OF THE POWER OF.
Vide ante, p. 123.

ALTERATION OF WRITTEN AGREEMENTS.

Vide GUARANTY, 2, 3.

B

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A promissory note was by its terms made payable to the makers' own order, but they omitted to endorse it. It was delivered by the makers, as a premium note upon an open policy, to a Marine Insurance Company. That Company was authorized "to negotiate premium notes for the purpose of paying claims or otherwise, in the regular transaction of its business." They delivered the note in suit, with others, to the plaintiffs, and had them discounted, and received the proceeds. A small amount of risks compared with the amount of the note had been taken and premiums earned. The note was to cover premiums to be earned. There was no evidence as to the application of the proceeds of the note, by the In-

Insurance Company. *Central Bank of Brooklyn v. Lang et al.* 202

2. *Held*, that the note was so negotiated by the makers, by its delivery to the Company, as to make it the same in legal effect as if payable to bearer, within the statute. (1 R. S. 768, § 5.) *id.*

3. *Held*, that the plaintiffs were *bond fide* holders of the note, getting it from a Company authorized in certain cases to negotiate it, and had a right to the presumption that it was discounted for an authorized purpose. *id.*

4. *Held*, that the plaintiffs were entitled to recover the whole amount, whatever might be the equities or rights between the makers and the Insurance Company. *id.*

5. The maker of a promissory note for the accommodation of the payee, cannot set up as a defence, in cases exempt from fraud, that the note was transferred to the plaintiff, in satisfaction of or as collateral security for a pre-existing debt. *DeZeng v. Fife.* 335

6. G., on the application of N., agreed to discount a note made by S. & McF., for \$1283 27, on being furnished with collaterals, being told at the time by N. that he wished to procure the discount for a friend who was not named, the friend being S. & McF.; and the latter thereupon delivered to N., as such collateral, a note which they owned, for \$2,000, made by R. and M.; and N. delivered it to G., as such collateral, telling him that as the \$2,000 note first matured, "to collect it and credit it in our account," by our account meaning the account of a firm of which N. was a member; and thereupon G. procured the note of \$1283 27 to be discounted at bank, on the security of the note for \$2,000 left with such bank as collateral, and the \$2,000 note was paid at maturity. *Geffcken v. Slingerland.* 449

7. G. has no right, as against S. & McF., to use such moneys to take up another note made by N.'s firm, then running to maturity, and which he had endorsed and procured to be discounted for such firm. Such a use and application of the proceeds of the \$2,000 note would be a fraud on S. & McF. G. knowing,

when he discounted the note for \$1283 27, that N. was acting for a friend, knew that he was the agent of such friend, and that the \$2,000 note was the property of the latter, and was furnished by him as security for the payment of the note to be discounted, or, at all events, he knew enough to put him on inquiry. *id.*

8. The relative rights of G. and of S. & McF. are not affected by the fact that the latter paid at bank the \$2000 note, pursuant to an arrangement between themselves and the makers of such note, by which the makers were to have a renewal for \$1500 of its amount on payment of \$500 in cash (the balance of it) to S. & McF., which balance such makers so paid to S. & McF., and gave them a renewal note for \$1500. Nor are such relative rights varied by the further fact, that S. & McF., before they paid the \$2,000 note, were informed by N. "what had passed between him and G. in relation to it," it not appearing that S. & McF. ever sanctioned or intended to sanction the application of the \$2000 note to any other purpose than to pay or secure the note for \$1283 27. *id.*

9. *Held*, further, that the payment of the \$2000 note, and the receipt and use of its proceeds by G., operated, as between him and S. & McF., as a payment of the note of \$1283 27, and made him their debtor for the difference; and, therefore, G. could not recover of S. & McF. the amount of the note for \$1283 27 (that being the note on which this suit is brought), but that the latter were entitled to a judgment against him for the difference between the amount of such two notes, with interest, the right to such excess being set up as a counter-claim, on a proper allegation of the facts in that behalf. *id.*

Vide EVIDENCE, 4, 5, 6, 16, 17, 18, 19, and FRAUDS, STATUTE OF, 1, 2.

BILLS OF LADING.

1. A *bond fide* assignment of a clean bill of lading to a purchaser for value is equivalent to an unconditional delivery of the goods themselves, so far as to supersede and render unimportant any conditional contract between the origi-

nal owner, or the party making such consignment, and the consignee. *Wardwell v. Patrick*. 406

Vide *SHERIFF*, 6.

C

CHECKS.

Vide *EVIDENCE*, 6.

CODE, CONSTRUCTION OF.

(§ 306, p. 329); (§ 397, p. 601); (§§ 113 and 163, p. 43); (§ 99, p. 406); (§ 169, p. 417); (§§ 390, 391, 392, p. 611); (§ 308, p. 618); (§ 121, p. 636); (§§ 382, 383, p. 659).—(Chap. 2, of TITLE 9, ante, p. 690).

COMMON CARRIERS.

1. A common carrier, in respect to the time of the delivery of goods received by him for transportation, when there is no express agreement, is bound only to use due diligence, and may excuse delay by showing that it was caused by some accident or misfortune occurring, without any fault on his part. *Blackstock v. N. Y. & E. R. R. Co.* 77
2. But this immunity does not extend to cases in which, although the carrier himself is free from fault, the delay has been caused by the negligence or misconduct of the agents or servants whom he employs. *id.*
3. The liability of a master, for a neglect of duty by his servant, exists independently of the question, whether any fault is imputable to himself; for the master, in assuming to perform a duty to third persons, assumes also the hazard of the competency and fidelity of the agents he employs.

This rule, which undoubtedly applies where the master is a natural person, applies even with greater force, when the employer is a corporation. *id.*

4. The operations of corporations are necessarily conducted by the instrumentality of agents, and to excuse them

from the performance of any duty which they owe to third persons, on the ground of the misconduct of their servants, would be, practically, to exempt them from liability for any negligence or misfeasance not the immediate or necessary consequence of a corporate act. *id.*

5. In the case before the Court, the delay in the transportation upon the defendants' road, of the plaintiff's goods, by which they were rendered nearly worthless, was caused solely by the misconduct of nearly all the engineers, and other persons, in the employ of the Company—whose services, in conducting the road, were indispensable, and who, without any justifiable cause, broke their contract with the Company, and by a combined action, upon one and the same day, abandoned their employment. *id.*

6. Held, that although no want of prudence or foresight in not anticipating this event, and guarding against its consequences, could be attributed to the defendants, and although it was not in their power to procure, immediately, the services of competent persons, to replace those by whom they were deserted, the law furnished no reasons for exempting them from a liability to make good to the plaintiff the loss which he had sustained from the misconduct of those whom they had employed. A sudden combination and strike of engineers is an event that may occur upon every railroad, and the hazard of its occurrence must, in all cases, rest upon the employers, who alone have it in their power to secure, by proper contracts, an indemnity against its consequences. *id.*

7. A Court of Justice has no power to relieve Railroad Companies from the hazard to which, the nature of their business, and the vast extent, to which it involves the employment of agents, necessarily subjects them. If a single engineer, having charge of a train, by his sudden refusal to perform his duty, should produce an injurious delay, the liability of the Company employing him, would hardly be doubted, and certainly the rule of liability cannot be varied by the number of the agents or servants who at one time are guilty of the same misconduct. *id.*

3. Held, that the allegation that the engineers who, in this case, abandoned their engines, were not the servants of the defendants when the delay complained of occurred, and that for this reason the defendants are not responsible, was unsupported by proof, since there was no evidence that their contracts with the Company had expired, or by any mutual act had been rescinded. *id.*
9. Held, further, that even upon the supposition that the desertion of the engineers put an end to their connexion with the Company, still, as this desertion was itself the cause of the delay that followed, and was a wrongful act committed by persons who, at the time, were the servants of the Company, the defendants were responsible for its consequences. *id.*

CONSIDERATION.

Vide ACTION, 1.
PRINCIPAL and AGENT, 2.
DEBTOR and CREDITOR, 6.

CONSIGNEE.

Vide ante, 177.

CORPORATIONS.

1. It is undeniable that a corporation may be bound by the act of an agent where the agent acts in the discharge of his duties, and within the scope of his powers as such, although the particular act may not have been directed or authorized by any formal resolution of the directors of the company. *The Corn Exchange Bank v. The Cumberland Coal Co.* 436
2. So a corporation is bound by the act of an agent done on its behalf and in its name, when it accepts the benefit of the act, although the agent had no prior authority, express or implied. The acceptance of the benefit is an adoption of his act. *id.*
3. But it is certain, that in every case, in order to bind a corporation, there must be proof of the prior authority of the

agent, general, or special, or of the subsequent adoption of his act. *id.*

4. When the powers of the agent are solely derived from an express authority, the terms of the authority must be strictly pursued, or it must appear that the corporation has accepted the benefit of his act, or has otherwise adopted it. *id.*

5. In the principal case, two members of an executive committee of the defendants, who were only authorized to act when the president, as one of their number, was present, in his absence made a contract for a lease by the defendants of certain rooms belonging to the plaintiffs, and it appeared that the defendants had never entered on the occupation of the rooms. *id.*

6. Held by the Court that the contract was void, and that no action thereon could be maintained against the defendants for the recovery of rent. *id.*

Vide COMMON CARRIERS, 4, 5; and
MUNICIPAL CORPORATIONS.

D

DAMAGES.

Vide AGREEMENT, 29.
SHERIFF, 4, 5.
INSURANCE, 30, and ante, 202.

DEBTOR AND CREDITOR.

1. In an action by a judgment and execution creditor of one of two partners, to set aside a transfer of his interest in the property of the firm to his co-partner, as being a fraud upon the individual creditors of the transferring partner, the question, whether such transfer is made with intent to defraud is one of fact, and not of law. *Griffin v. Cranston.* 281
2. When such an action has been tried by the Court without a jury, and the transfer has been set aside as a fraud upon such individual creditors, and the defendant appeals, and the case, as settled, purports in terms, to contain a statement "of the facts and conclu-

- sions of law" found by the Court, and no conclusions of law are stated, except such as are affirmed in the judgment or order entered on the decision of the Court; then the conclusions of law so affirmed, should be regarded as the Court's conclusions of law upon the particular facts so stated to have been found. The only conclusions stated in such a judgment or order, which can be, properly, treated as conclusions of fact, and as intended to have been so stated, are such, as when found at all, must, from their nature, have been necessarily found as facts. *id.*
3. The Court, on the trial of such an action, should, by its decision, dispose of all questions of right and liability. An order entered on the decision of the action, which disposes of only some of the questions raised by the issues, and orders a reference, expressly reserving the determination of other questions until the coming in of the report of the referee, is not an order, on an appeal from which, any decision actually made on the trial, can be reviewed, except the competency of the Court to direct such an inquiry by the referee, as the order provides for. *id.*
 4. When such a transfer by one partner to the other, is made on an undertaking of the latter to pay all the partnership debts, and also, to pay liabilities created by the partner, (who so transfers), in the firm's name, for his own benefit, and the interest so transferred is worth less than the amount of his part of the debts so assumed to be paid, and parts of the transferred property have been so applied, and the residue is being, properly, so applied, the individual creditors of the debtor-partner cannot, in the nature of things, be defrauded, by such a transfer. Nothing is transferred to which they have any right. On such a state of facts, an actual intent to defraud, should not be found, except upon the most clear and satisfactory evidence of such an intent. *id.*
 5. When, at the time of such a transfer, three other papers are executed, one being a dissolution of the firm, and one being a paper stipulating to hire the assigning partner and his wife, board them, and pay them \$5000 per annum, if the profits of the future business amount to so much, and the other is a mortgage by the assigning partner of individual property to secure the payment of \$25,000, stated in such mortgage to be due; such papers alone, do not demonstrate that the transfer was made with a fraudulent intent. *id.*
 6. The fact, that the instrument of transfer does not disclose its true consideration, will not preclude the transferee from showing what the consideration was, and if it, be made to appear that it was sufficient, and that the transaction was honest, it will be upheld. It will not be held fraudulent merely because the written papers do not state the consideration. *id.*
 7. The agreement for hiring the assigning partner and his wife, when, upon the other evidence, the transaction appears to be honest, and upon full consideration, will not necessarily establish a fraudulent intent, when by the terms of such agreement the transferee is not to pay any thing for their future services besides boarding them, unless future profits are earned, and their services are clearly worth more than their board. There is an obvious distinction between such a transaction, and the case of a debtor assigning his property upon terms unjust and inequitable as to his creditors, upon the condition of obtaining wholly, or in part, a future support out of the assigned property, as a part of the consideration of its transfer. *id.*
 8. Such a mortgage is not void upon its face, nor do its terms demonstrate a fraudulent intent. Upon the question of the intent with which it was made, the defendant may prove any facts that a Court of Equity would allow to be alleged and proved in an action to secure results not provided for by its terms, but on settled principles held to be consistent with it. And if, on the whole evidence, it appears to have been made with an honest intent, a transfer of other property by another instrument of the same date, will not be held fraudulent merely because such mortgage, does not on its face disclose the precise debts or liabilities it was made to secure. *id.*
 9. Papers of the same date, and between the same parties, when they do not re-

far to each other, nor in fact relate to the same subject matter, are not, necessarily, to be deemed part and parcel of the same transaction, in such sense that if one cannot be sustained as against the creditors of one of such parties, the others must, as a matter of course, be held fraudulent, or void. *id.*

Vide *USURY*, 1.
SURETY, 1, 2, 3; and *ante*, 449.

DEVISE

This was an equity suit, and its objects were to compel the defendant Davenport to surrender to the plaintiffs the possession of certain lots in the city of New York, and to convey to them a clear title, and to account to them for the rents and profits received by him during his possession. The plaintiffs claimed title as devisees under the will of Mary Clarke, who died seized of the premises. The defendant Davenport derived his title by mesne conveyances from one Thomas Ash, Jr., to whom the lots were sold and conveyed by Thomas B. Clarke, the father of the plaintiffs, by virtue, it was alleged, of his powers as a trustee under certain acts of the Legislature and orders of the Chancellor. The plaintiffs insisted that the orders of the Chancellor were void, as exceeding his authority under the acts of the Legislature, and also insisted, upon other grounds, that the sale and conveyance to Ash were fraudulent and void. They also insisted that the defendant was bound to prove the money consideration, stated in the deed to Ash; and that no such proof having been given, the Court was bound to hold, that as against the plaintiffs the conveyance was void. *Clarke et al. v. Davenport*. 95

The conclusions of the Court upon the whole case were—

1. First.—That Thomas B. Clarke, on the 12th of November, 1817, when he sold and conveyed to Thomas Ash the lots in controversy, had full power and authority, as a trustee under the acts of the Legislature and orders of the Chancellor mentioned in the pleadings, to sell the same, and to give to a *bond fide* purchaser a good and indefeasible title. *id.*

2. Second.—That the conveyance to Ash, in its terms and upon its face, was exactly such as Clarke, under the statutes and orders before mentioned, was fully authorized to make. *id.*

3. Third.—That this conveyance, being a deed of bargain and sale, and its execution and delivery being admitted, was sufficient proof, in the first instance, that it was in reality founded upon the pecuniary consideration therein stated; and that the acknowledgment therein contained was also sufficient proof that the consideration mentioned was, in fact, paid. *id.*

4. Fourth.—That this deed, therefore, upon its face raised a use which, by force of the statute, was executed in the purchaser, thereby vesting in him a full legal title to the premises in question. *id.*

5. Fifth.—That the burthen of proof to impeach the validity of the deed, by showing a different consideration than that therein stated, was cast upon the plaintiffs, and that the allegations in the bill which were put in issue by the answer, that the true and only consideration was the satisfaction of an antecedent debt contracted by Clarke for his personal benefit, were wholly unsustained by proof. *id.*

6. Sixth.—That the title acquired by Ash was not impaired or affected by an alleged misapplication by Clarke of the purchase money received by him. The case not belonging to any class of trusts in which, as the law formerly stood, a purchaser from a trustee was bound to see that the purchase money was properly applied to the purpose of the trust. *id.*

7. Seventh.—That there was no evidence that could justify the Court in saying, that the orders of the Chancellor, under which the sale and conveyance to Ash were made, were procured, as is alleged, by a concealment and misrepresentation of material facts; but that, on the contrary, the truth of the representations contained in the petition of Clarke, upon which the orders were founded, was established by the report of the Master to whom the petition was referred, and by the confirmation of that report by the Chancellor. *id.*

8. Eighth.—That had the clearest proof been given, that the orders in question were procured by fraud, yet, as they were regular and valid on their face, the fraud would not have affected the title of an innocent purchaser, and there was nothing in the pleadings or proofs to show that actual or constructive notice was imputable to Ash. *id.*
9. J. Thomas, by his last will, devised all his estate to trustees, in trust, to apply so much of the rents and profits as might be necessary to the support and maintenance of his wife during her life, and to divide the residue among his three children named in the will, during their lives. Two, only, of the children, and the wife, survived the testator. *Griffin v. Ford.* 123
10. *Held*, that the trust created no suspense of the power of alienation beyond the lives of the two children living at the death of the testator. *id.*
11. *Held*, that the provision for the wife was in the nature of an annuity, and was, therefore, a legacy, and a charge within the meaning of sub. 2 in § 55 of the Statute of Uses and Trusts, and that it was to this sub. of § 55 that the trust (created for its satisfaction) must be referred. *id.*
12. *Held, therefore*, that the provision created no suspense of the power of alienation during the life of the wife. The will, as construed by the Court, directed that the estate of the trustees, as to the real estate, should cease upon the death of all the children, and the fee then go to their heirs. *id.*
13. *Held*, that if the provision for the wife suspended alienation during the continuance of the trust, the suspense ceased when the trust was determined, and the provision then became a mere charge upon the lands in the possession of the heirs as owners. *id.*
14. *Held*, that a charge upon lands in the possession of the owner, neither at common law nor under the statute, creates a trust suspending alienation, or any trust whatever. Such a charge is simply a debt, for the payment of which the lands are a security, and it imposes no restrictions upon the transfer of the debt or of the lands. *id.*
15. The testator authorized his trustees to grant leases for a term not exceeding twenty-one years from the making thereof. *id.*
- Held*, that these words confined the trustees to a grant of leases in possession, and that when a power to lease is thus limited, a lease, to commence in possession upon a future day, is wholly void. *id.*
16. *Held, therefore*, that a lease in question, which was executed and delivered on the 20th of December, 1849, for a term of years not to commence until the 1st of May, 1850, was void in its creation upon its face. *id.*
17. The testator directed that his trustees, in making leases, should reserve the best and most improved rent that could be gotten; and it was proved upon the trial, and found by the Judge, that when the lease in question was executed, a much higher rent than that reserved could have been obtained. *id.*
- Held*, that a trustee, directed to obtain the best rent, is bound to the exercise of reasonable diligence, as well as of good faith; and as it has clearly appeared that this diligence had not been used, the lease in question must, upon that ground, be adjudged to be void. *id.*
18. A lease for a longer term of years than is authorized by the power under which it is made, although bad at law, is good in equity for a term corresponding with the power, and is void only for the excess. *id.*
19. The counsel for the appellant insisted, that as the whole title, legal and equitable, in the house and lot to which the controversy related, was vested in the existing trustee under the will, he was the person alone competent to maintain the action; and that, as he was not the plaintiff, but had been made a defendant, the complaint ought to be dismissed. *id.*
20. *Held*, that as the object of the action, so far as relief was sought against the trustee, was to enforce his performance of his trust, it was properly brought by a person for whose benefit the trust was created, and was warranted by the express words of the very section

in the R. S., that had been relied on in support of the objection. (§ 60, 1 R. S. p. 729.) *id.*

Vide *ante*, 214.

E

ESCAPE.

Vide *SHERIFF*, 1.

ESTOPPEL.

1. In an action, to recover the possession of family portraits, by one having a paper title from the original owner (the plaintiff's paternal grandmother); it appearing that the plaintiff had permitted his father to have the possession of them for several years, and that the latter took them to the residence of the defendants, and left them there temporarily, (one defendant being his daughter, and the other the husband of such daughter,) the plaintiff does not forfeit his right of property, because the defendants, to his knowledge, and without objection from him, repaired the pictures while in their possession, at their own expense, they not then claiming title, and the plaintiff not having disclaimed it. *Hunt v. Moultrie and wife*. 531
2. Declarations, made by the plaintiff, tending to show that he was not the owner, though competent as evidence against him on the question of title, cannot operate as an *estoppel* to his claim of property, when it does not appear that such declarations ever came to the knowledge of the defendants, or have been acted upon by them. *id.*
3. The facts that; the father, in his lifetime, brought an action against the defendants, and which was pending when he died, to recover possession of the portraits, and made an affidavit that he was the owner of them, and that the plaintiff signed an undertaking in that action as surety for his father, is no bar to an action by the son, to recover the property, after his father's death, it not appearing that the son ever saw such affidavit, and it also appearing that the father was advised when he com-

menced such suit, that it should be brought by his son as owner, but could be maintained by the father as bailee; nor do such facts *estop* the plaintiff from claiming title as owner, as against defendants who have no claim of title, or right of possession conferred, or attempted to be conferred on them, by any one claiming to own them, or the right to have the possession of them. *id.*

4. Although a defendant may be entitled, equitably, to an allowance, on the trial, for services rendered and materials furnished to the plaintiff after suit brought, yet, if on the trial an inquiry into them, subsequent to suit brought, is excluded by the Court on the defendant's motion and objection, such defendant cannot object, on appeal from the judgment, that he was not allowed for such matters furnished subsequent to suit brought. *Ford v. David*. 569
5. When a plaintiff, under a contract between him and one of several defendants, and under subsequent contracts between such defendant and his co-defendants, in relation to the same matter, claims, in good faith, a right to be boarded without charge, as due to him upon a just construction of such contracts, and such board has been furnished under such claim, and as of right due to the plaintiff, the defendants so furnishing it cannot recover of the plaintiff for its value, though the Court may think the plaintiff's construction of the contracts erroneous. *id.*

Vide *SHERIFF*, 6.

LIFE INSURANCE, 5.

EVICITION.

Vide *LANDLORD and TENANT*, 1, 2.
LESSOR and LESSEE, 2.

EVIDENCE.

1. Any evidence which is material to the issue, though given on the cross-examination of a witness, does not conclude the party cross-examining. The matters thus testified to are not to be treated as collateral matters, in respect to which a witness cannot be contradicted. It is error, to preclude a party from showing the truth of the case, in

- respect to such matters, notwithstanding the evidence sought to be contradicted was elicited by his cross-examination. *Mills v. Carnly*. 159
2. When improper or irrelevant evidence has been admitted by a referee, the error in its admission will be disregarded if it manifestly appears that the evidence could not have influenced his decision, and that his conclusions must have been the same, had it not been received. *Belmont v. Coleman*. 188
 3. A bill of exchange, drawn upon an incorporated Company, and accepted by its president, is presumptive evidence that it was founded on a sufficient consideration and was drawn for legitimate purposes within the purview of the charter of the Company. *id.*
 4. In an action in which the plaintiff relies upon the validity of the bill as binding the Company, the burthen of proof, when its validity is denied, as drawn for purposes not within the lawful powers of the Company, rests upon the defendant. *id.*
 5. In an action against an individual stockholder of an incorporated Company, by whose charter the stockholders are made liable for its unsatisfied debts—the record of a judgment against the Company, and an execution thereon returned unsatisfied, are *prima facie* evidence that the debt so recovered was a valid debt of the Company, and the burthen of proving collusion or mistake is cast upon the defendant. *id.*
 6. A bank check, in the hands of the drawer, paid by him, is not evidence, *per se*, of a debt due to him from the payee; but when it is shown that the check was in fact lent to the payee, it may be read in evidence to prove the amount of the loan. A draft, in the hands of an acceptor, and paid by him, is not evidence of a debt due to him from the drawer; but on the contrary, the presumption of law is, that the draft was drawn against funds of the drawer, then in his hands. In order to charge the drawer of a bank check, it is not necessary to show presentment for payment and refusal, if it is proved that, at the time, he had no funds in the bank upon which the check was drawn. *Reddington v. Gilman*. 235
 7. When an account has been rendered to a defendant which, on the trial, he refuses to produce, and which, it appears, was transcribed from the ledger of the plaintiffs, the account in the ledger is good secondary evidence. But when no reason is shown for not producing the ledger, a copy of the account taken from the ledger cannot be received, as it is plainly not the best secondary evidence which, the plaintiffs had it in their power, to give. The American cases have established that there are grades in secondary evidence, and the true rule deducible from them is, undoubtedly, that laid down by Mr. GREENLEAF; namely, "That, if from the nature of the case itself it is manifest that a more satisfactory kind of secondary evidence exists the party will be required to produce it, but when the nature of the case does not disclose the existence of such better evidence, the objector must prove its existence, and must also prove that it was known to the other party in season to have been produced on the trial." *id.*
 8. The referee in this cause, overruling the objection of the counsel for the defendant, had admitted in evidence a copy of an account, taken from a ledger, admitted to be in the possession of the plaintiffs, as proof of the contents of an account which, it was alleged, had been rendered to the defendant. *Held*, that the evidence ought not to have been received, and that, for this error, the judgment upon the report of the referee must be reversed, and a new trial ordered. Costs to abide event. *id.*
 9. When an agent or servant performs an act which it was for the manifest benefit of his principal or master, should be performed, the assent and authority of such principal or master to the performance of the act will be implied. *Purvis v. Coleman*. 321
 10. The endorsement, by a sheriff, or other officer, of the time of the receipt of a "summons" in an action, is not, of itself, evidence of the fact, so as to show the time of the commencement of an action, within the 99th section of the Code. There not being any statutory provision requiring such an endorse-

- ment, as in case of an execution, the rule which admits, as evidence, such endorsement in the latter case, does not apply. *Wardwell v. Patrick*. 406
11. Questions of fact to be determined upon conflicting evidence, and as to the credibility of the witnesses by whom such evidence is given, it is the province of the jury to decide. Their verdict will not be set aside, on the ground that it is not warranted by the evidence, unless it is clearly wrong. *Whiting v. Otis*. 420
 12. In such a case, if irrelevant and incompetent testimony is admitted against the objection of the defendant, a verdict against him will be set aside, when such testimony was calculated to prejudice his defence with the jury. *id.*
 13. When the main question was whether the defendant, falsely and fraudulently, and to the damage of the plaintiffs, represented a third person to be worthy of credit, evidence that, the defendant, on a subsequent settlement of his claims with such third person, by taking payment in goods, received some of the goods sold, by the plaintiffs to such third person through the alleged fraud of the defendant, is inadmissible, when no attempt has been made to prove that the defendant knew that fact, at the time he accepted such goods. *id.*
 14. So also, is evidence that, a witness for the plaintiffs heard that the defendant, after the alleged fraud, went to the residence of such third person, to obtain a settlement and payment of the amount owing to the defendant from such third person. *id.*
 15. It is error to preclude the defendant from putting questions to a witness for the plaintiffs, pertinent to matters as to which he had been examined by the latter, and excluding his answers, when competent and material. *id.*
 16. The consideration of the three notes, on which this suit was brought, was a purchase of goods made by the defendant from the firm of Whitlock, Frenau, Anderson & Co., the payees in the notes, and the sole defence was, that when the goods were purchased, one Vose was a partner in the firm, and ought, therefore, to have been made a plaintiff in the action. It appeared, however, that the notes in suit were a renewal of those first given for the goods, and that before this renewal Vose had ceased to be a partner. *Whitlock v. McKee*. 427
 17. *Held*, that as the complaint averred that, the plaintiffs are the payees in the notes mentioned, and that they are the lawful holders and owners thereof, and these allegations are not denied in the answer; the fact that Vose was a partner when the goods were purchased was wholly immaterial, and that upon this ground alone the plaintiffs were entitled to judgment. *id.*
 18. *Held* further, that it was competent to the plaintiffs to show that before the notes in suit were given, Vose had retired from the firm, and had assigned to the plaintiffs all his interest in the debt which the notes represented, since the necessary effect of the evidence was to prove that the plaintiffs, as the sole owners of the debt, were the sole owners of the notes, thus effectually disproving the allegation that Vose (who, it was thus shown, never had any interest in the notes) was a necessary party to the action. *id.*
 19. The objection that this evidence ought not to have been received, as it tended to show that the plaintiffs were suing, in part, as the assignees of Vose, although no such assignment was stated in the complaint, was certainly groundless. The evidence, on the contrary, proved that as the notes, when delivered, belonged wholly to the plaintiffs, no assignment from Vose was necessary or could have been made. Although, under the statute, when the words, "& Co." are added to the name of a mercantile firm, they raise a presumption that there is a partner not named, yet this presumption may be overcome by positive proof, and in the opinion of the Court was so overcome, on the trial of this action. It was proved, that although the notes were given to the firm of Whitlock, Frenau, Anderson & Co., yet the plaintiffs were in fact the sole payees. *id.*
 20. Eugene W. McCarty, being the owner of a dwelling house, (covered by a mortgage owned by the plaintiff,) insured

the same against loss by fire; the loss, if any, being, by the terms of the policy, made payable to "Seth Grosvenor" (the plaintiff), "mortgagee." In an action by the plaintiff upon the policy, this Court, holding in obedience to *The Traders' Ins. Co. v. Robert*, and to *Tillot v. Kingston Mu. Ins. Co.* that, no acts of the mortgagor, done after the issuing of the policy, could affect the rights of the mortgagee under it, or to recover upon it; also held, that the admission of evidence that, when the defendants were applied to, to issue the policy, they were told that the interest of the mortgagee was to be insured, and they advised, as the best mode, the insertion of his name in the policy, as it was done; could not prejudice the defendants, and was not, therefore, an error entitling them to a new trial. *Grosvenor v. The Atlantic Fire Insurance Co. of Brooklyn.* 469

21. The mortgage, owned by the plaintiff, being one that the insured had executed to E. Kellogg, and the latter had assigned to the plaintiff, at the same time guaranteeing its payment; it was also held that Kellogg was, under the code, a competent witness for the plaintiff: The action cannot, by reason of Kellogg having given such a guaranty to the plaintiff, be said to be prosecuted for the immediate benefit of Kellogg. At most, he is merely interested in the result. *Id.*

22. The fact, that the mortgage has been foreclosed, and the mortgaged property sold, and a part of the mortgage debt thereby paid, cannot be made available to the insurer, as a partial defence to an action on the policy, when no such defence is set up in his answer. *Id.*

Vide ACTION, 3.

SHERIFF, 6.

DEVISE, 3, 5.

INSURANCE, 2.

GUARANTY, 2, 3; and ante, 431.

F

FACTORS OR AGENTS.

1. When an agent has a general authority to sell goods, entrusted to him by the owner, or is held out to the world

by his principal as possessing that authority, a sale made by him to an innocent purchaser, although in violation of his duty, and of his secret instructions, cannot be impeached. But the mere possession of goods, by a factor or commission merchant, is not evidence to the world that he has an unlimited authority to sell them, so as to preclude the owner from impeaching a sale made by him, by showing that the goods were entrusted to him for a wholly different purpose. *Cook v. Beale & Adams.* 497

2. It is true, there are some dicta that support this proposition, and that have led to its adoption by some of the text writers; but there is no express adjudication, and the cases relied on as justifying it, when carefully examined, are found to lead to an opposite conclusion. *Id.*

3. A sale made by a factor or agent not entrusted with the documentary evidence of title, or with the goods themselves for the purpose of sale, is not rendered valid by the provisions of the Factors' Act. On the contrary, the 6th section of the act, by a necessary implication, declares such a sale to be void. *Id.*

FIRE INSURANCE.

The insurance, in this case, by a policy against fire, was upon "the printing, and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam-engine, and machinery, contained in the buildings, described in the policy, and privileged for a printing office, bindery, and book store, and steam boiler in the yard." The Jury found that when the policy was effected, the use of camphene for fine work in the printing of books, was a general and established usage among printers, and that its use for this purpose was not only more advantageous than that of any other article, but was necessary. The 8th condition, annexed to the policy, provided among other things, that the Company should not be liable for a loss by fire, "occasioned by camphene or other inflammable liquid." The loss claimed, in the opinion of the Court, was not "occasioned by camphene," in the true meaning of the exception. *Harper v. The City Insurance Co.* 520

1. *Held*, that under the finding of the Jury, the defendants, when the policy was effected, were chargeable with a knowledge of the fact, that camphene was one of the materials used by the plaintiffs in the printing of books, and, consequently, that its use for this purpose was as effectually protected, by the general words of the policy, as if it had been authorized in terms. *id.*
2. *Held*, that evidence of the general and established usage of printers was properly admitted. *id.*
3. *Held*, that as camphene was an article covered by the policy, the defendants took upon themselves the risk of any and every loss incident to, or resulting from its use. *id.*
4. *Held*, that by this construction, the exception in the 8th condition of the policy was not wholly superseded, since it might still operate to exempt the defendants from a loss occasioned by the use of camphene for any other purpose than as a material for the printing of books. *id.*

Vide INSURANCE, 1, 2, 9; and ante, 469 and 507.

FRAUD.

Vide 159 and 281.

FRAUDS; STATUTE OF.

1. The payee and first endorser of a note, cannot recover against the second endorser, either in an action on the note itself, or on the allegation and proof of a verbal agreement, that the note was endorsed by the second endorser to accommodate the maker, and to secure payment to the first endorser, of a loan of money made to the maker on the security of such endorsement, and on the agreement of the second endorser to pay the note at maturity, if the maker did not. *Hauck v. Hund.* 481.
2. To allow a recovery in such a case would violate the rule which prohibits the clear legal import of a written contract to be varied by parol, and would violate the Statute of frauds, which declares all agreements to answer for the

debt or default of another, unless in writing and subscribed by the party to be charged, to be void. *id.*

3. A request by the defendant to the plaintiff, to attend, as physician and surgeon, upon a third person, and a promise by the defendant to the plaintiff that, if he will so attend, the defendant will pay therefor, and the bestowing of such attendance by the plaintiff, upon such request, and relying solely upon such promise, render the defendant liable to pay what such attendance is reasonably worth. His promise need not be in writing to be obligatory. It is an original undertaking. The fact that he was under no obligation, prior to making such request and promise, to furnish or procure such attendance, does not make it essential to the validity of such a promise, that it be in writing. *Hanford v. Higgins.* 441.
4. But the defendant in such a case may, at any time, give notice to the plaintiff, that he will not be liable for attendance or services subsequently rendered, and on so doing, the plaintiff can make no claim on him for services or attendance subsequent to such notice. *id.*

FREIGHT.

Vide ante, 177.

G

GUARANTY.

1. A guaranty, before the Code, was assignable, so as to give an equitable title to the assignee, although he could not sue thereon in his own name; but, under the Code, it is not merely assignable, but the action thereon must be brought in the name of the assignee, as the real party in interest. *Small v. Sloan.* 352
2. There is no presumption and no rule of law that can warrant a Court or jury to infer, from the mere fact that the body of an instrument or endorsement is not in the hand-writing of the signer, that it has been altered, or that it did

not appear in the same form when the signature was made. *id.*

3. When circumstances of suspicion are proved, the party claiming under the paper may, properly, be required to satisfy a jury that it was signed in the form in which it appears; but in all other cases, the plaintiff is bound to prove the signature alone, which is *prima facie* evidence that the defendant contracted the obligation that the paper imports. *id.*

I

INJUNCTION.

Vide PRACTICE; (INJUNCTION.)

INN-KEEPER.

1. In an action, by a guest, against an inn-keeper to charge him with the loss of money or valuable articles, it is a good defence, that actual notice had been given to the plaintiff, that a safe had been provided for the purpose mentioned in the act "to regulate the liability of hotel-keepers," although no notice, stating that fact, was posted, at the time, in the room occupied by such guest. The act, although not in terms yet by a necessary implication, sanctions the defence. *Purvis v. Coleman*. 321

INSURANCE.

1. The American Mutual Insurance Company of Amsterdam, having insured the plaintiffs against loss or damage by fire, and having issued some nineteen other policies insuring the like number of other persons or firms; its agent, while such policies were in force, entered into an agreement with the defendants, The Commercial Fire and Marine Insurance Company, of Jersey City, by which agreement the latter "reinsure the American Mutual Insurance Company of Amsterdam, upon the following policies issued by them," (specifying the said twenty policies,) "loss, if any, payable to the assured upon the same terms and conditions, and at same time, as contained in the original poli-

cies. Reinsured from November 30th, 1854, 12 o'clock, at noon, to the expiration of the policy."

2. *Held*, that such agreement was a contract of reinsurance, and that the plaintiffs could not sue upon it. That any moneys recoverable under it, for a breach of it, would be the property and assets of the Company so reinsured. That the plaintiffs had no right to such moneys, nor any lien upon them to satisfy a loss under the policy issued to them, notwithstanding the Company which insured them had failed before such loss occurred. That the word "assured" in such agreement meant the Company re-insured, and not the assured in the original policies, and that it could not be shown by parol that it was the understanding between the defendant and such agent at the time the agreement was executed that the word, "assured," as used therein, was intended to apply to, and designate the persons insured by the original policies. *Carrington et al v. Com. Fire and Marine Ins. Co. Jersey City*. 152
3. Although the maxim that "*causa proxima non remota spectatur*," is the rule that governs the liability of Insurers, yet in its application, the words, "proximate cause," are not to be understood in their strict and limited sense, as meaning only the cause that immediately precedes and directly occasions a loss. *Tilton v. The Hamilton Fire Ins. Co.* 867
4. The maxim, understood in this limited sense, would confine the liability of insurers to losses produced solely by the direct agency of a peril, insured against, upon the property insured. *id.*
5. It is settled now, however, that insurers, both upon Marine and Fire Policies, are not only responsible for losses produced by the direct action of a peril insured against, but for losses in their nature consequential. *id.*
6. The general rule may be stated in these words, that insurers are not liable for consequential losses, other than such as are physically or legally necessary, unless it appears that the property insured, was involved in a peril insured against, and must have perished from

that cause, had the peril continued to operate. *id.*

7. Under this condition, there are two classes of consequential losses, for which insurers are held to be answerable; first, where the loss, although not a necessary, is a natural consequence of the peril insured against, by natural, meaning a usual and probable consequence, and such, therefore, as it is reasonable to believe, was in the contemplation of the parties, when the contract was made. *id.*

8. Second, where the property insured is extricated from the peril by which it must have been destroyed by means not anticipated by the parties, but by which it is taken from, and never again restored to the possession of the assured. *id.*

9. *Held*, that a loss by the stealing of goods at a fire in a large and populous city, is a consequential loss that may, properly, be referred to each of these two classes, and is, therefore, recoverable, (although fire is the only risk mentioned in the policy,) as a loss occasioned by fire.

10. Under the conditions in a policy of insurance against fire, it is the duty of the assured to deliver to the Company, as a part of the preliminary proofs, a just and true account of his loss; and the delivery of this account is a condition precedent to his maintenance of an action for the recovery of the loss. *Irving v. The Excelsior Fire Insurance Co.* 507

11. The assured is bound by the statement thus delivered, and cannot, upon the trial, impeach its truth, and recover upon testimony showing a different state of facts from that which it contains. *id.*

12. A witness, alleged to be a partner of the plaintiff, was examined on the trial to show the nature of the plaintiff's interest in the property insured, and it was insisted on the part of the defendants that his testimony was inconsistent with the statement delivered by the plaintiff to the Company, and, therefore, ought not to have been received. *id.*

13. But the Court held that there was a substantial agreement between the statements and the testimony, and that the latter was rather explanatory than contradictory, and that the necessary result of both was that, the plaintiff, if not the legal, was the equitable owner of all the property insured.

Held, therefore, that the property, on which the loss was claimed, and which was a stock of goods, in a certain store, was properly described in the policy as "his (i. e. the plaintiff's) stock," there being no other goods in the store to which the description could be applied. *id.*

14. *Held*, that it could not be doubted that the plaintiff meant to cover by an insurance, and the defendants meant to insure the very property destroyed, and this intention the Court was bound to carry into effect, if this could be done without violating the rules of law. *id.*

15. The general rule is that the assured is not bound to disclose the nature of his interest, whether legal or equitable, a several or an undivided share, unless the disclosure is material to the risk; and in the case before the Court, whether the property insured was "his" (the plaintiff's) at law or in equity, was plainly immaterial. The nature of his ownership could not possibly alter or affect the character of the risk. *id.*

16. *Held*, that this view of the plaintiff's rights was not forbidden or varied by a condition in the policy, that "if the interest in the property be a leasehold interest or other interest not absolute, it must be so represented to the Company, and expressed in the policy in writing, otherwise the insurance shall be void." *id.*

17. The plaintiff's interest in the property was not qualified or contingent, but in the fullest sense of the term was absolute. The property belonged to him in his own right, and not as a trustee for another; and if his interest was merely equitable, it was in its nature as absolute as a legal ownership, and hence the condition in the policy did not require it to be disclosed. *id.*

18. *Held*, that even if the interest of the

- plaintiff, in the property insured, was that of a partner, still his interest was properly described in the policy, and was insured to its actual extent. *id.*
19. That an insurance made by a partner on partnership property, although made in his own name, and expressed to be on his sole account, protects his undivided share, so as to entitle him in the event of a loss to recover to the extent of that interest, may be regarded as settled and undoubted law. *id.*
20. The conclusion, that the decisions fully justify, is that the plaintiff would be entitled to recover, to the extent of his own interest, even had it been proved that the witness Clark was interested as his partner in the stock of goods, which the policy describes as "his (the plaintiff's) stock," for although the description would be literally untrue, yet in order to carry into effect the certain intention of the parties it would be construed as applying not to the whole stock, but to the plaintiff's undivided share. *id.*
21. Lastly, in the opinion of the Court, the testimony tended to show that the copartnership arrangement between the plaintiff & Clark, gave to the latter no interest in the capital stock as owner, but only secured to him a share of the net profits when realized. *id.*
22. If such was the arrangement Clark could assert no title in the property insured, and, consequently, the property was rightly described by the plaintiff in the policy as "his stock." Hence in every possible aspect of the case the plaintiff was entitled to judgment. *id.*
23. An insurance broker has a lien for the premiums paid by him and his commissions upon the policies which he effects, even when it is known to him that the person who employs him is merely an agent for the party assured; and when it is not known to him that his employer is merely an agent, he has probably a similar lien as against such employer, for the general balance of his account. *Sharp v. Whipple*. 557
24. But the lien of the broker, whether special or general, is extinguished, when he parts with the possession of the policies, by their delivery to the assured or his agent. *id.*
25. The lien, however, again attaches, or, in the language of the books, is revived, if the policies come again into his possession from the person against whom the right in its origin existed. It is not revived, if they come into his hands from a person not known to him as his employer, or the assured, when the insurance was effected. *id.*
26. If there is no lien when the insurance is effected, no subsequent transaction between the broker and the agent who employed him can create such a lien as against the owner assured. *id.*
27. An insurance "for whom it may concern" does not necessarily embrace all who may at the time have an insurable interest in the property insured, but the general words are restricted to those for whose benefit the insurance was in fact made, whose rights and interests were then meant to be protected. *id.*
28. Hence, when an insurance by general words is made for the exclusive benefit of one partner, or part-owner, he is entitled, in the event of a loss, to recover the whole sum insured, when it does not exceed the value of his interest. Hence, also, as the policy belongs to him exclusively, he is entitled to demand its possession from the broker who effected it, and, when necessary, to maintain an action in his own name against such broker for its wrongful conversion. *id.*
29. In order to maintain such an action, a demand and refusal are not necessary to be proved, when it appears that before the action was commenced the broker, in violation of his duty, had surrendered to the insurers, or otherwise parted with the possession of the policy. *id.*
30. A broker who has compromised with insurers liable for a total loss, for a less sum than the amount then recoverable, and has given up the policy, is answerable to the owner assured for the whole sum insured, and not merely for that which he received, when it does not appear that he had any authority,

express or implied, to make the compromise. *id.*

31. So an insurance broker is also guilty of a wrongful conversion, who, having obtained a judgment upon a policy in his own name, uses the judgment for his own benefit, or deprives the assured, by any means, of the power of enforcing its collection. *id.*

Vide FIRE INSURANCE,
LIFE INSURANCE,
MARINE INSURANCE, and ante,
469.

J

JURISDICTION,

Vide ante, 645, 671.

JURY.

Vide EVIDENCE, 11.

L

LANDLORD AND TENANT.

1. A wrongful eviction of a tenant only suspends the rent or excuses the tenant from the payment of rent thereafter accruing, but does not prevent the collection of that which had already accrued and become payable. *La Forge v. Haley.* 171
2. In an action against the tenant for the recovery of such rent, the only use which the defendant could make of a subsequent eviction, would be by way of a recoupment of the damages he had sustained therefrom. The sureties of a tenant in an action against them for the recovery of rent accrued, cannot avail themselves of a defence that would be only available to the tenant, by way of a recoupment or counter-claim. *id.*
3. Where the tenant has a claim against the landlord, which is a distinct cause of action, the sureties, unless the claim has been assigned to them, can have no right to use it or any part of it for their own benefit. *id.*

4. Whether the sureties under special circumstances, such as the insolvency of the tenant or his collusion with the landlord, may not be entitled to relief in a Court of Equity, is a question which the Court declined to consider, as in the case before it no facts showing a title to any equitable relief were set forth in the answer. *id.*

Vide ante, 645.

LEASE.

Vide DEVISE, 15, 16, 17.
LESSOR and LESSER, 1; ante,
436.

LESSOR AND LESSEE.

1. An instrument in writing, by which one party "agrees to let for one year from its date" certain premises, and by which the other party agrees to pay the stipulated rent quarterly, and declaring that the "agreement shall continue in force and effect for one year from the date hereof" operates as a lease, *in presenti.* *Harbui v. Post.* 28
2. When a lessee, not being permitted to take possession of the whole of demised premises, nevertheless enters into possession of the residue, and occupies and enjoys such residue, and pays full rent for two quarters without claiming a deduction, and is sued for the third quarter's rent, he cannot set up the fact that he at no time had possession of the whole, as a bar to the action. Such a withholding of a part is not an eviction, nor a matter of equivalent effect. He must pay for the part he has enjoyed, upon the principle of a *quantum meruit.* *id.*
3. When the lessor, in a lease to two persons as lessees, agrees to render services of a stipulated character, for the lessees during the lease, for a commission, and the lessees, before the expiration of the lease, dissolve their co-partnership, and thenceforth each prosecutes the same business on his own account and solely for his own benefit, such lessor is not bound to render the stipulated services for only one of such lessees, and his neglect or refusal to do so is no bar to an action to recover

subsequently accruing rent, nor will it give to either of such lessees a right of action which can be interposed as a counter-claim in a suit against the two to recover such rent. *id.*

4. Nor will the fact of such dissolution, and an agreement between the lessees that each shall thenceforth occupy separately a distinct portion of the demised premises, accompanied by such separate and several enjoyment, of themselves and alone, affect the lessor's right to maintain an action against such lessors jointly, to recover the rent which, by the lease to them, they stipulated to pay. *id.*

LIEN.

Vide INSURANCE, 23, 26.

LIFE INSURANCE.

1. When a life policy of insurance is renewed, the policy itself, the representations made by the assured when the policy was effected, and the certificate of renewal are to be construed together, and to receive, if possible, a consistent interpretation. *Peacock v. N. Y. Life Ins. Co.* 338
2. As the design and object of the parties is to renew a pre-existing contract, the terms employed will not be deemed inconsistent with the conditions of the policy, if they reasonably may be construed in harmony with them. *id.*
3. Hence, when the policy is renewed, upon the condition that the assured is then in "good health," the words, "good health," in the certificate of renewal, will be construed in the same sense as the same words in the representations made by the assured when the policy was effected, and which were declared to be "the basis of the contract." *id.*
4. If, therefore, the health of the assured, when the policy was renewed, was substantially the same as when it was effected, and he was then subject to no other complaints than those he had before specified, the insurers, in the event of his death, will not be excused from the payment of the sum insured, upon the ground that his health, when the insurance was renewed, was not positively and absolutely good. *id.*
5. When the preliminary proofs, furnished in good faith, to an Insurance Company, are defective, the Company is bound, in common fairness, to suggest the defect, and not hold it in reserve, in order to delay the payment of a loss, or compel a new suit for its recovery. *id.*

RE

MARINE INSURANCE.

1. The insurance, in this case, was upon goods "from New York by steamer or steamers to Chagres, at and from thence by the usual conveyances across the Isthmus to Panama, and at and from thence by steamer or steamers to San Francisco." *Van Valkenburgh v. The Astor Mutual Ins Co.* 61
2. *Held* by BOSWORTH, J.—That the policy covered three distinct voyages by different conveyances, and that the implied warranty of seaworthiness attached at the commencement of each. *id.*
3. *Held contra* by HOFFMAN, J.—That although the conveyances were different, the voyage was entire, and that the implied warranty attached only at the commencement of the voyage from New York. *id.*
4. It was found by the Judge, who tried the cause without a jury, that the goods insured were damaged by being saturated with water during their transportation in a flat boat on the Chagres river, that the water entered and came into the boat by reason of its leaking when the goods were put on board, and that such damage was not, nor was any part of it, caused by rain or spray. *id.*
5. *Held* by the Court.—That it was a necessary conclusion from the facts thus found, that the goods were not damaged by the perils insured against, and consequently the defendants were not answerable for the loss. *id.*

MASTER AND SERVANT.

Vide EVIDENCE, 9.

MORTGAGE OF PERSONAL PROPERTY.

Vide RECEIVER, 1, 2, 3, 4, 5, and 6.

MUNICIPAL CORPORATIONS.

1. When, by an ordinance of the Corporation of the City of New York a pier is directed to be built or extended, the payment by the Corporation of one-third of the expense is, under the statute, a condition precedent to the acquisition by the Corporation of a right to receive half of the wharfage, and the burthen of proving the payment rests upon the Corporation. *Murray v. Sharp.* 589
2. The statute does not contemplate that the Corporation shall pay one-third of the expense in advance of the improvement, but it does require that its election, to make such payment, shall be made before the work is begun, and that the payment shall be made within a reasonable time after the work is completed. *id.*
3. Hence, if the whole expense of the improvement has been borne by private owners who, for years, have received the whole wharfage, the Corporation cannot, by offering to pay one-third of the original expense and interest, place itself in the same position, and acquire the same rights, as if such payment had been made in due season. Its right, by making the payment, to acquire a share of the wharfage, is extinguished. *id.*
4. When the private owners of a pier have an exclusive right to the wharfage, the Corporation cannot legally deprive them of this right, by appropriating the slip, adjoining the pier, to the purposes of a public ferry. *id.*
5. If such a power may be exercised by the Corporation, it can be so only upon the payment to the owners of a just compensation. *id.*

N**NEGLIGENCE.**

Vide PRACTICE, APPEAL, 2.
SHERIFF, 7.
PARTNERS, 1, 2, 3, 4.

NEW TRIAL.

Vide PRACTICE.
EXCUSABLE NEGLIGENCE; and ante, 629.

P**PAPERS OF SAME DATE, BETWEEN SAME PARTIES.**

Vide DEBTOR and CREDITOR, 9.

PAROL EVIDENCE.

Vide DEBTOR and CREDITOR, 6.
INSURANCE, 2; and ante, 431.

PARTIES.

Vide AGREEMENT, 12.
DEVISE, 19, 20.
GUARANTY, 1.

PARTNERS.

1. The defendant, owning a stone quarry, agreed, on the 9th of October, 1854, with one Edward Hollis, as follows: Hollis agreed with Bettner to blast stone in this quarry, and fit them for market, with men and materials to be furnished and paid for by himself. Bettner was to procure them to be drawn to his dock on the Hudson River, preparatory to selling them there, or forwarding them to New York to be sold. Hollis's men were to assist Bettner's teamster in loading the stone at the quarry, and in loading them on a boat if sent to New York for sale. Hollis was to pay half the expense of the powder, purchased necessarily for the business. Bettner was to retain possession of the stone and sell them. And it was further agreed that "the

net proceeds shall be equally divided, share and share alike, one half to said Hollis, and the other to belong to said Bettner." *Cotter v. Bettner*. 490

2. In November, 1854, while the business was prosecuted under this agreement, the plaintiff, while at work on adjoining premises, was injured by the careless and negligent manner in which stone were blasted out of this quarry, by men employed by Hollis, and under his exclusive direction and control, and sustained damage to the amount of \$1800. *id.*

3. *Held*, (1.) That the defendant was liable for such injury. *id.*

4. (2.) That Bettner and Hollis were partners in quarrying the stone, and in the results of the business, in the sense and to the extent that the defendants in the case of *Bostwick v. Champion et al.* (11 Wend. 571, and 18 *id.* 175) were partners. *id.*

5. (3.) One partner is liable to third persons for the negligent acts of his co-partner in the prosecution of the partnership business. And each is liable, in *tort*, for the negligence of the servant employed and paid by one of them exclusively, by which a third person is injured, while such servant is engaged in the due course of his employment, in transacting the business of said partnership. *id.*

Vide INSURANCE, 19, 20.

PLEADING.

1. Generally.

Vide AGREEMENT, 14, 15, 16, 17, 18.
EVIDENCE, 22.
VARIANCE, 1, 2, 3.

2. Complaint.

Vide AGREEMENT, 14 and 15.
EVIDENCE, 16, 17, 18, 19.
PRACTICE, title COMPLAINT.

3. Counter-claim.

Vide LANDLORD and TENANT, 2.
LESSOR and LESSEE, 2.
BILLS OF EXCHANGE, 9.

4. Demurrer.

Vide AGREEMENT, 17.

PRACTICE.

1. Abatement.
2. Answer.
3. Appeal.
4. Arrest.
5. Attachment.
6. Complaint.
7. Contempt.
8. Costs.
9. Defence.
10. Discontinuance.
11. Examination of a Party.
12. Excusable Neglect.
13. Injunction.
14. Irregularity.
15. Judgment.
16. Parties.
17. Receiver.
18. Security for Costs.
19. Supplementary to Execution.
20. Trial.

1. Abatement.

1. An assignment by a plaintiff, *pendente lite*, of his interest in the subject of the action, does not abate it. *Ford v. David*. 569

2. It is discretionary with the Court to substitute the assignee as plaintiff, or allow the action to proceed in the name of the original plaintiff: when a motion to so substitute has been made and denied, and the time to appeal is allowed to expire, the fact of such a transfer cannot be made available at the trial, to defeat a recovery, nor does it present a question which can be considered, on an appeal from the judgment. *id.*

3. Nor will the judgment that may be rendered at the trial be different, in its substantial terms, from the judgment that would have been rendered, had no such transfer been made. *id.*

4. When two persons are named as defendants in a summons and complaint, and only one is served, and judgment is thereupon perfected against him, there is, then, no action pending against the other, until he is served with the

summons. *The East River Bank v. Cutting and Caldwell*. 636

5. If he is served with it, after judgment against the other, and intermediate those periods, the title to the cause of action becomes vested in a third person, the latter cannot, under § 121 of the Code, be substituted, as plaintiff in the action against the defendant last served. *id.*

6. If a sole defendant die pending an action after issue joined therein, and before trial, his personal representatives have no right to an order requiring the plaintiff to continue the action against them, as the defendants therein. In such a case, the plaintiff, at his election, may require it to be discontinued. *Keene v. La Farga*. 671

2. Answer.

1. When some of the defendants demur to the complaint, and the demurrer is overruled, "with liberty to answer in twenty days, on payment of costs," and such decision, on an appeal to the General Term, is affirmed, such defendants must tender an answer within twenty days after such affirmance, although the costs of the demurrer have not been taxed, or the right to answer is gone. *Ford v. David*. 569

2. A decision, subsequently made on the trial of the action, denying a motion then made for leave to answer, is not the subject of an exception which can be reviewed on an appeal from the judgment. *id.*

3. Appeal.

1. Where, upon a trial, facts have been specially found by the jury in answer to questions submitted by the Judge, and a verdict directed subject to the opinion of the Court at General Term; a motion cannot be entertained at General Term to set aside the finding of the jury, upon one or more of the questions submitted, as against evidence. Such a motion must be made in the first instance at Special Term, and it is only upon an appeal from an order there made, that such a motion can be considered by the Court at General Term. *Purvis v. Coleman*. 321

2. When no such motion is before the Court at General Term, the finding of the jury upon the questions of fact submitted to them, must be regarded as conclusive, and the duty of the Court, as it is upon a special verdict, is merely to declare the law arising upon the facts as found. Negligence, when the facts upon which the charge depends are disputed, is a mixed question of law and fact. The jury must ascertain the facts, and the Judge must instruct them as to the rule of law which they are to apply to the facts as they shall find them. *id.*

3. On an appeal from a judgment in an action tried before a jury, the action will not be examined, as to its general merits, upon the whole evidence; whether the verdict is against evidence can only be considered by the Court at General Term, upon an appeal from an order granting or refusing a new trial. *Brown v. Richardson*. 403

Vide DEBTOR and CREDITOR, 3.

ANSWER, 2.

TRIAL, 2.

ABATEMENT, 2; and ante, 629.

4. Arrest.

1. An order of arrest will not be vacated, on a motion made after the defendant has answered; on the mere ground that, the summons is erroneously entitled, especially when that defect is not specified in the notice, as a ground of the motion. *Bedell v. Sturte*. 634

2. When the cause of action is one, which, of itself, gives the plaintiff a right to an order of arrest, the order will not be vacated, merely because the moving affidavits deny the existence of the cause of action. *id.*

5. Attachment.

1. A defendant whose family is occupying, and for several years has been occupying, a dwelling-house in another State, hired by him, and who habitually passes the night of each day, and the Sabbath, with his family, is a non-resident of the State of New York, within the meaning of the statutes of the latter State, authorizing an attach-

ment, in an action, of the property of a non-resident defendant. *Chaine v. Wilson*. 673

2. On such a state of facts, he is a non-resident, although he is in business as a merchant in New York city, and passes eight hours of every business day there, (unless sick, or absent on business of his firm,) and has all his business capital in such business, keeps his bank account there, and had selected such family residence on account of its proximity to the city, and for economy in living, and although he might be served with process in such action, any day, during business hours. *id.*

3. Whether a man's absence from his family be for eight hours in each day, or six days in each week, if he has a family living in a neighboring State, for whom he provides, to whom he resorts for comfort, relaxation and repose, and with whom he abides whenever the immediate demands of his business upon his attention will permit; whenever sickness disables him from conducting that business; and when those days successively return on which business ceases, and man rests from his labor; he resides in such neighboring State, where (in every proper sense, as understood no less by those who are learned in the law, than by the common intelligence of every-day life,) is his home. *id.*

4. Where one has a *home*, as that term is ordinarily used and understood among men, and he habitually resorts to that place for comfort and rest, relaxation from the cares of business and restoration to health, and there abides in the intervals when business does not call; that is his *residence*, both in the common and legal meaning of the term: When a man has such a home, and habitually uses it as such, and a place of business in another State, such place of business is not his residence, within any proper definition of the term. *id.*

5. It is not enough that one *intends* to change his place of residence: The intent and the fact of such change must concur. Nor is it enough that he intends to change his residence, and sincerely believes that what he has done amounts in law to a change of his residence. His opinion will not produce

that result, nor affect the question, if the actual change have not taken place. *id.*

6. Upon an appeal from an order, founded upon a decision, of a question of fact, upon conflicting affidavits and doubtful circumstances, the order should not be reversed, unless the Appellate Court is satisfied that the decision of the Judge who made it, upon such question of fact, is wrong. *id.*

6. Complaint.

1. In [an action upon a note, by which the makers promise to pay to a third person or order, a sum named, in merchandise, a complaint, which alleges the making and endorsement of the note to the plaintiff, and that the plaintiff "is the lawful owner and holder of it," is sufficient, on these allegations being put at issue, to admit evidence of an actual sale and delivery of the note to the plaintiff. *Brown v. Richardson*. 402

7. Contempt.

Vide ante, 655.

8. Costs.

1. When two persons are made defendants, and sued as joint makers of a promissory note, and they answer separately, and one of them pleads infancy as his sole defence, they thenceforth cease to be "united in interest," within the meaning of those words as used in § 306 of the Code. *Butler v. Morris*. 329

2. In such a case, the Judge at the trial, on the fact of infancy being proved, may, in his discretion, permit the plaintiff to discontinue the action, as against such infant, without costs. *id.*

3. An action to restrain the defendant from violating his written agreement by which he covenanted to sell to the plaintiffs certain articles, manufactured by him after some secret process known only to himself; and not to sell similar articles to others; and by which the plaintiffs covenanted to sell such articles, and allow him therefor, a stipu-

- lated price, is not an action "for an adjudication upon an instrument in writing," within the meaning of those words as used in § 308 of the Code, as amended by CHAPTER 723, of the Laws of 1857, although the chief contest between the parties related to the validity, construction, and legal effect of such written agreement. *Gray v. Robjohn*. 618
4. When an action is brought to recover a debt, or damages; or for a specific performance; or for an injunction; or for other like redress, and such is the relief which the complaint prays the Court to adjudge; it is the nature of the relief prayed, and not the evidence relied upon to support the plaintiffs' title to such relief, which determines the object of the action. *id.*
5. In such actions, the successful party is not entitled to an extra allowance under § 308 of the Code, notwithstanding the decision of them, may, incidentally, involve the construction of a written agreement. *id.*
6. An assignee, under a general assignment, by a debtor, of his property in trust for his creditors, although a trustee of an express trust, must prosecute as such, in order to be exempted from payment of the costs of the action, if he fail to recover. *Murray v. Hendrickson*. 635
7. When he sues in his own right, and is defeated, he must pay costs, if the action be one in which, a plaintiff, failing to recover, pays costs as a matter of course. *id.*
8. When a Special Term order, which overrules a demurrer to the amended complaint, is, on appeal, reversed, and judgment is ordered in favor of the defendant, but leave is given, to the plaintiff, to amend his complaint, on paying the costs of the demurrer at Special Term, to be taxed, the defendant is entitled to a charge of \$10, for proceedings before notice of trial, and a like charge, for proceedings after notice and before trial, although the same sum has been once paid, for the latter class of services, on sustaining a demurrer to the original complaint. *Considerant v. Brisbane*. 644
9. When a plaintiff, in an action for the recovery of money, for goods sold and services rendered, recovers a verdict for a less sum than \$50, he must pay the defendant's costs of the action, as a matter of course. *Peet v. Warth*. 653
10. Such a plaintiff is not "the prevailing party," within the meaning of those words, as used in § 311 of the Code. The party who, by law, is entitled to his costs of the action is, in respect to the matter of the costs, the prevailing party. *id.*
11. The right to recover "the necessary disbursements," is incident to and inseparable from the right to recover the costs of the action. *id.*
12. A non-resident plaintiff, in an action to recover the possession of personal property, took proceedings in the action, under § 209 of the Code, to procure the property to be delivered to her, and gave to the sheriff the undertaking prescribed by that section; and thereupon the defendant obtained a return of the property, under § 211. *Gelch v. Barnaby*. 657
13. Held, that the plaintiff might be required to file security for costs, notwithstanding she had already given an undertaking, under and conforming to § 209. Whether the defendant, after obtaining a return of the property, can maintain an action, upon the plaintiff's undertaking,—*quære?* *id.*
- Vide ante, 655.
9. Defence.
- A defendant who has demurred to the complaint, and whose demurrer has been overruled, cannot, on an assessment of damages, be permitted to prove matters in their nature giving a right to reduce the amount of the plaintiff's claim, and as such constituting a partial defence. To give a right to prove, and be allowed the benefit of them, they must be set up by answer, as a defence. *Ford v. David*. 569
10. Discontinuance.
- Vide ante, 636.

11. *Examination of a Party.*

1. Where a party to an action is made a witness by his adversary, he is as much entitled to witness's fees, as a condition to creating it his duty to attend and be sworn, as any third person. *Hevolett v. Brown.* 656
2. A six days' notice to appear and be examined, and notifying him that, if he fail to do so, he will be liable as for contempt, and to have his answer stricken out, are not sufficient to authorize an order, (on his default to appear,) striking out his answer, or to punish him for contempt. *id.*

12. *Excusable Neglect.*

1. In an action, brought by the owner of property on which each of the several defendants claim to have a lien (under the Mechanics' Lien Law), to ascertain the amount and priority of their liens upon such property, and upon a fund produced by a judicial sale thereof, and to procure a discharge of such liens, and to determine the extent of the personal liability of such owner; a defendant, whose claim was not attempted to be proved on the trial of such action, further than to prove the pendency and condition of a proper proceeding in another Court to establish it; will be permitted, even after trial and judgment, to have the case so far opened, as to enable him to establish his claim, its amount, and its relative priority, when the omission to prove it at the trial occurred under such circumstances, as make it a case of excusable neglect, provided such relief can be granted without subjecting the other parties to any loss or damage, beyond the mere delay to which they will be thereby subjected, and provided also, that the party seeking such relief shall submit to such conditions as it may be proper to impose in order to protect fully the rights of the other parties to the action. *Levy v. Joyce.* 622
2. Especially will such relief be granted, when a refusal to grant it will cause a loss to the moving party of his entire claim, and it is clear that the proceedings on his part have been conducted in good faith, and the proceedings are novel in their character, and depend

for their regularity and validity upon the construction of a statute, which has not received any judicial interpretation in relation to proceedings like those in question, and the grant of such relief can be made upon terms, which will not present any matter to be litigated except, the existence, amount, and relative priority of the applicant's claim, and he consents, as a condition to being relieved, to pay to the other parties their just costs of the further litigation as to his claim. *id.*

13. *Injunction.*

1. Whether an injunction may rightfully be issued to restrain a defendant from working, *pendente lite*, for any other person than the plaintiff, in violation of a contract with the plaintiff, is, upon the authorities, a doubtful question, but the precedents in this State seem to be against the exercise of the power. Admitting, however, that the power of granting such an injunction, *pendente lite*, exists, it is certain that its exercise must, in many cases, be a harsh and oppressive proceeding, since it may deprive the defendant of his only means of gaining a subsistence or of supporting his family during the continuance of a litigation that may last for months or years. *Frederick v. Mayer.* 227
2. There are certain rules that ought to govern a Court of Equity in the exercise of its summary, and in a degree, arbitrary power of granting injunctions, and these rules forbid the exercise of the power where it will operate oppressively or work an immediate injury, or when the right of the plaintiff is doubtful, or the facts are not clearly ascertained. An injunction should not be issued unless the right is clear, and it will not be awarded in doubtful cases, nor in new ones not coming within established principles. *id.*
3. These views ought to govern the Court even upon a final hearing: Much more should they be deemed controlling when the application is for an injunction *pendente lite*, and the grounds of the application are controverted and the facts are involved in serious doubt. *id.*
4. *Held*, that the plaintiff, upon the papers before the Court, had failed to establish

a case that could warrant the issuing of an injunction in the present stage of the action. Neither the right, nor the facts upon which he relied, were clearly established. *id.*

5. The 47th section of the Act relating to summary proceedings by a landlord to recover possession from a tenant holding over after non-payment of rent (2 Rev. Stat. p. 516), is not repealed by the Code. *Duigan v. Hogan*. 645

6. A Court of Equity, after proceedings have been had, under that act, before a magistrate, for the dispossession of the tenant, and a warrant has been issued, has no power to interfere, by injunction, to prevent the execution of the warrant, on the ground that the tenant has a claim against the landlord for damages for breach of his covenant to repair, exceeding the amount of the rent in arrear. *id.*

7. If the magistrate errs in awarding such warrant, his determination may be reviewed in the manner prescribed by the statute, and if the proceedings be reversed or quashed, the tenant has his remedy by action for the damages caused by the dispossession. *id.*

8. When there is no charge of insolvency of the landlord, the tenant, having a claim for damages, or any cause of action against him, which cannot be used to defeat the proceedings before the magistrate, should pay his rent and prosecute such cause of action, and this will presumptively give him a full remedy, without the interference of a Court of Equity, by injunction, to stay the execution of a warrant of dispossession. *id.*

14. Irregularity.

1. When an action, in form, against two persons jointly liable, is commenced by a service of the summons on one defendant alone, and a notice of appearance, by the latter as attorney for both, is served, and he puts in an answer for himself only, and a trial is had on the merits, and a judgment dismissing the complaint is rendered; and on proof, that notice of appearance for both defendants was served by mistake and without authority, a motion is made to have the judgment, which has been

entered, recite that the defendant not served did not appear in the action, although such relief may be granted, it is error to vacate the judgment, and all proceedings had subsequent to the day preceding the trial, and to grant a new trial to the plaintiff. *Keyes v. Moultrie*. 629

2. When a judgment for such a cause, is thus modified in its recitals, a plaintiff who has relied on such notice of appearance, as authorized and valid, should be relieved from all proceedings had on the faith thereof, which would be valid if such notice was authorized, but which are invalid, or may be avoided, if it was unauthorized, and from such proceedings only. *id.*

3. When the action has been tried on its merits, as if both defendants had appeared, if no error was committed at the trial, the plaintiff should not have a new trial, merely because the unauthorized notice is allowed to be corrected, and the recitals in the judgment made to state the truth in that behalf. If error was committed at the trial, the judgment would be reversed on the plaintiff's appeal, as well with the recital of the non-appearance of Palmer in it, as if it recited the fact of his actual appearance. *id.*

Vide ante, 655 and 659.

15. Judgment.

1. A statement made for the purpose of entering a judgment under sections 382 and 383 of the Code, which states as the facts out of which the debt arose; "that heretofore at the City of New York, I (Hodgins,) made my certain promissory note for the sum of two thousand dollars, payable on demand, and that I have not paid said note, and that I am justly indebted to the plaintiff, (Kendall,) thereupon, in the said sum of two thousand dollars," is wholly insufficient to authorize a judgment to be entered upon it. *Kendall v. Hodgins*. 659

2. A judgment entered on such a statement, and an execution issued on such a judgment may be set aside, on the motion of a bona fide purchaser of lands, on which the judgment is an apparent

lien; as to such purchaser, and the lands so purchased, and such lands be declared to be freed and discharged of and from the apparent lien of such judgment, and of and from any and every proceeding whatsoever, under and by virtue of, or founded on such judgment. *id.*

Vide ABATEMENT, 1, 3.
COSTS, 2; ante, 622, 629.

16. Parties.

1. When one person enters into a contract with two others by name, without knowing or having at the time any reason to suspect that they have a partner in the business to which such contract relates; in a suit upon such contract the two with whom it is made may alone be sued, and it is not necessary to make their partner, if they had one, a party. As to such a transaction, and under such circumstances, he may be treated as a dormant partner, although the plaintiff knew before suit brought that the two had such a partner at the time the contract was made. *Hurbit v. Post.* 28

Vide ACTION, 6; and ante 636.

17. Receiver.

1. A Receiver, under supplementary proceedings, as a general rule, has no right to take possession of and sell the goods and chattels of the debtor which he knows are covered by a prior mortgage, unless he can show that, as against the judgment-creditor, the mortgage was fraudulent and void. *Manning v. Monaghan.* 459
2. If, by the terms of the mortgage, the debtor has a temporary right of possession, the Receiver, if authorized to sell at all, must limit the sale to such temporary right, and is bound to declare that it is made subject to the mortgage. *id.*
3. Nor has he any right, in such a case, to sell the mortgaged property in parcels, but is bound to sell the whole together, so as to enable the mortgagee to follow it in the hands of the purchaser. *id.*

4. Where the Receiver makes the sale unlawfully, he is liable to the mortgagee for the amount of the mortgage debt and interest, provided such was the value of the mortgaged property; and in case he acts with the knowledge and by the direction of the plaintiff in the suit in which he was appointed, such plaintiff is equally liable. It is doubtful whether a Receiver can sell mortgaged property at all, unless by an express order of the Court appointing him. *id.*

5. When mortgaged goods are unlawfully sold by a Receiver, a purchaser who has no knowledge, actual or constructive, of the mortgage, as a *bona fide* purchaser is not liable to the mortgagee. See note †, ante, p. 467. *id.*

18. Security for Costs.

Vide COSTS, 12, 13.

19. Supplementary to Execution.

1. A proceeding instituted under § 292, of the Code, can be terminated as absolutely by the plaintiff's abandonment of it, as by an order of the judge before whom it was commenced. *Squire v. Young.* 690
2. In this case, the day to which it was last adjourned, either by the judge or by the consent of the parties, was the 9th of July, 1857. On that day the plaintiff neither moved the matter before the judge, nor called his attention to it, nor did he again move in the matter until the following October. On the 16th of December, an order was made, based on the original order (granted on the 11th of March), and on an examination of the debtor, and of a witness had on the 17th and 24th of April, appointing a receiver of the debtor's property. *id.*
3. Held, that the order of the 11th of March, and the proceedings had thereon, must be deemed to have been absolutely abandoned and terminated, and that the subsequent order of the 14th of December was unauthorized and erroneous. *id.*
4. In proceedings, under chap. 2 of title 9

of the Code, the judge can exercise no powers except such as it confers, either in express terms, or by necessary implication. *id.*

30. Trial

1. On a trial of issues of fact between the plaintiff and some of the defendants, the plaintiff may, and should, also apply for the relief to which he is entitled, as against other defendants who have demurred. *Ford v. David.* 569
2. A decision at the trial, denying a motion for leave to amend an answer, served some two years prior thereto, is, in the most favorable view that can be taken for a defendant, a decision within the discretion of the Court, and is not the subject of an exception. *id.*

Vide **DEBTOR and CREDITOR**, 3.
SHERIFF, 7.

POWERS.

1. A general power to sell real estate given by will to the executors, as such, and not by their names as individuals, is not revoked by the refusal of one of them to act, but survives to, and vests in those who qualify. *Canover v. Hoffman.* 214
2. Such a power is not revoked by a codicil devising the estate to the executors in trust to make an equal division thereof among the children of the testator and their heirs. When there are no express words of revocation, the provisions in a codicil are never construed as revoking those of the will, unless they are so entirely repugnant that, to give effect to those in the codicil, those in the will must wholly fail. *id.*
3. There is no such repugnancy between a power to sell and a trust or power to divide. A general power to sell given to executors, includes an authority to sell for the payment of debts; and to the execution of such a power, the rights of devisees and heirs have always been held subordinate; and the power previously given can no more be taken away by a direction to divide the estate than by a devise of the estate itself. *id.*

4. When the power exists for any purpose, a *bond fide* purchaser is protected, no matter for what purpose the power is in fact exercised. A power to sell, and a power to divide, are so far from being incompatible, that the exercise of the former may be necessary to the proper execution of the latter; that is, a sale may be necessary to enable the trustees of the power to make a just and equal division. *id.*

5. *Held*, in the principal case, that a purchaser from the executors acquired a valid title, disentangled from any trust, and freed from any limitations, created by the will. *id.*

Vide *ante*, 123.

PRESUMPTION.

Vide **GUARANTY**, 2, 3.
BILLS OF EXCHANGE, 3.

PRINCIPAL AND AGENT.

1. A power of attorney which, by its terms, authorizes the attorney "to buy and sell real estate and personal property, and to collect rents, money, and debts, and to do every act and thing necessarily pertaining thereto," and given as the principal was about to leave the State temporarily, and accompanied with a deposit, by the principal, of \$1,800 in money with the agent, does not authorize the agent to purchase a merchant tailor's establishment, and give promissory notes, in the name of the principal, for the contract price. *Mills v. Carnly.* 169
2. Accordingly, when such an agent, assuming to act in the name of his principal, made such a purchase, amounting to \$4,123.16, and took a transfer of the property to his principal, and paid for it by cancelling a debt for \$966, which the vendor owed to such agent, and by giving four notes for \$789.29 each, in the name of his principal, at 3, 6, 9, and 12 months, the agent being irresponsible, and not informing his principal of the fact of such purchase, and subsequently the property was seized on an execution against such vendor, and a suit was brought by such agent, in the name of his prin-

cipal, against the sheriff, for such taking of the property, and the Judge at the trial charged the Jury that, the agent had authority, under such a power, to make such a purchase, and to agree to pay the contract price in instalments, and therefore could give notes in the name of his principal, and that such notes would be valid, and that, in so far as the validity of the transfer depended upon the fact of there being a sufficient consideration to uphold it, the consideration in this case was sufficient, *held*, that the charge was erroneous, and that, on such a state of facts, there was no sufficient consideration to uphold the sale, as against the creditors of the vendor; and that the notes given by the attorney were not obligatory upon his principal. *id.*

3. On the facts of this case, as established by the evidence given at the trial, it was also held, that the inference, that the purchase and sale were made, and immediately followed by an assignment, by the vendor, of all his property to such agent, with a view and with the intent, by means thereof, to effect a favorable compromise with the creditors of such vendor, and to speculate, out of such a result; and that the jury would have so found but for the erroneous instruction as to the sufficiency of the consideration, was a just one. *id.*

Vide EVIDENCE, 9.

COMMON CARRIERS, 3, 4; and ante, 486, 490, 497.

PURCHASER (*bona fide*), RIGHTS OF.

Vide DEVISE, 8.

POWERS, 4, 5.

RECEIVER, 5; and ante, 659.

RE

RAILROAD COMPANY.

Vide ante, 77.

RECEIVER.

Vide PRAETOR (*Tide*), RECEIVER.

RE-INSURANCE.

Vide ante, 152.

RESIDENCE AND DOMICILE.

Vide ante, 673.

REVOCATION BY A CODICIL.

Vide ante, 214.

S

SHERIFF.

1. In an action against a sheriff, for the escape of a party, in his custody under an execution against the body, it is not a defence, that the attorney of the plaintiff consented that such party might go to another place, out of the bailiwick of said sheriff, in order to attempt to raise money, with which to pay the judgment on which the said execution was issued. *Lovell v. Orser.* 349
2. When a sheriff takes possession of personal property, under service of legal process, he is bound only to ordinary care and diligence in its custody, i. e. the same care and diligence that a prudent man would take of his own property. But if the sheriff leave the property in the possession of the defendant in the action, he becomes an insurer of it to the plaintiff, and nothing will excuse him in the event of a loss, but the act of God or of public enemies. *Moore v. Westervelt.* 357
3. Such is the settled rule, where property is taken by the sheriff under an execution, and, in reason, the rule is just as applicable, when the possession is so taken in an action, under the Code, for the delivery of personal property. *id.*
4. In such an action, the sheriff did not take actual possession of the property; and it was proved, in the present suit, which was brought by the plaintiff in the former, that the deputies, whom

the sheriff had directed to take charge of it, were guilty of gross negligence. *id.*

It was therefore *held*, that he was liable to the plaintiff to the full extent of the damages which it was proved that the property had sustained. *id.*

5. *Held further*, that the right of the plaintiff to recover such damages, was not waived nor affected by his receiving, from the defendant, the delivery of the goods in their damaged state. *id.*

6. It is probable that the sheriff, in an action against him for the recovery of such damages, is estopped from denying the title of the plaintiff, but, at any rate, a bill of lading, showing the goods to have been consigned to the plaintiff, is *prima facie* evidence of his owner, ship. *id.*

7. A Judge is not bound to submit to the jury the question of negligence, although there may be a conflict of evidence in relation to some of the facts relied on as proving it,—if, rejecting the conflicting evidence, the negligence charged is conclusively proved by the defendant's own witnesses. *id.*

SHIPS AND SHIPPING.

1. A notice, given to the consignee of goods by the master of a vessel of her arrival, is not equivalent to a personal delivery of the goods, so as to entitle the master to demand the immediate payment of freight. The freight cannot be claimed until the goods have been unladen and a delivery has been made or tendered. *Clark v. Masters.* 177

2. The delivery of merchandize by the master of a vessel, and the payment of freight by the owner and consignee, are simultaneous and concurrent acts; so that the master is not bound to deliver the goods until the freight is paid or tendered, nor the owner to pay the freight until the goods are unladen and delivered, or the delivery is tendered. *id.*

3. But the owner is not bound to accept a delivery and pay the freight, until he has had an opportunity to examine into the state and condition of the goods, and to ascertain their quantity, since

he has a right to deduct any damage they may have received on the transportation not imputable to the perils of navigation, and any deficiency in quantity from the usual or stipulated freight. Hence, if the quantity and quality of the goods cannot be ascertained by an examination on board, it is the duty of the master to unlade them and place them in a situation in which the necessary examination may be had. *id.*

4. Such is emphatically the duty of the master when the owner of the goods offers, at his own expense, to tranship the goods into a lighter for examination, and to continue the lien upon them during such examination. *id.*

5. The contract of affreightment, in respect to each consignment, is entire, and the master has no right to divide it into lots or parcels and demand a *pro rata* or proportionate freight on each. No portion of the freight is demandable until the whole consignment has been delivered, or tendered for delivery. *id.*

6. *Held*, that as the charge of the Judge upon the trial, in effect denied the above propositions, the exceptions to it were well taken, and there must be a new trial, costs to abide event. *id.*

STATUTES, CONSTRUCTION OF.

(R. S. vol. i. 728, § 55, sub. 2, and § 60, p. 729, ante, p. 123); (*id.* vol. i. 662, § 8, ante, p. 207, and see Laws of 1858, p. 251); (1 R. S. 768, § 5, ante, 203); (2 R. S. 516, § 47, ante, p. 645.)

SURETY.

1. Taking the note of a debtor, or a transfer of property from him, as collateral security only, without any agreement to extend the time of payment of the original debt does not operate to suspend the remedy on the original debt, either against such debtor or his sureties. *Williams v. Townsend.* 411

2. The new security being a note of the original debtor at twelve months, secured by his mortgage of real estate, the whole effect, of taking them as col-

lateral security merely, is, that such mortgage cannot be foreclosed until the twelve months' note becomes due. *id.*

3. Mere delay to sue the principal, however long continued, does not discharge the surety. *id.*

4. When several defendants, against whom a judgment has been recovered, unite in an appeal, from it, to the General Term, and third persons execute, as sureties, an undertaking on such appeal, in the terms prescribed by section 335 of the Code, such sureties are not discharged from liability, merely because some of such appellants abandon their appeal, if the respondent obtains an affirmance of such judgment. *Burrall v. Vanderbilt.* 637

5. Neither are such sureties discharged, because an order is made on the consent of the respondent's attorney, without their consent, or notice to them, that the Clerk enter on the docket of such judgment, the words, "secured on appeal," and such entry is, thereupon, made. *id.*

6. The facts that, after suit is brought on such an undertaking, the judgment of affirmance is appealed from to the Court of Appeals, and such an undertaking is given as is required, to stay proceedings, in the Court below, on such judgment, cannot be plead in bar, or in abatement of the action, on such undertaking. *id.*

Vide LANDLORD and TENANT, 2, 3, 4.

T

TRUSTS AND TRUST ESTATES.

Vide ante, 95, 123.

U

UNDERTAKING.

Vide SURETY, 4, 5, and 6.

USURY.

1. A debtor having sold and transferred property to his creditor in payment of a debt, such property cannot be seized on an execution against such debtor, merely because the debt so paid was usurious. After a voluntary payment of such a debt by the debtor, only the usurious excess can be recovered back, and that can only be done within a year after such payment, when the action is brought by such debtor or his personal representatives. *Mills v. Carnely.* 159

V

VARIANCE.

1. The action was brought to recover the price of goods which the complaint averred had been sold and delivered to the defendant. The purchase was proved to have been made by the defendant, but the goods were delivered to a third person, and for the use of such person. Upon this ground, and upon the authority of *Smith v. Leland*, 2 Duer, 497; the referee dismissed the complaint. *Rogers v. Verona.* 417

2. Held, that there was not a failure to prove the allegations in the complaint in their entire scope and meaning, but merely in some particulars. Hence, the variance under § 169 of the Code, ought not to have been deemed material, as there was no proof that the defendant had been actually misled by it to his prejudice in maintaining his defence. *id.*

3. Held, also, that the variance ought to have been disregarded under § 176, which requires the Court to disregard any error or defect in the pleadings, which shall not affect the substantial rights of the adverse party. *Smith v. Leland* explained and distinguished. *id.*

Vide AGREEMENT, 30.
EVIDENCE, 16, 17, 18, 19.

VENDOR AND VENDEE.

Vide VARIANCE, 1, 2, 3.

W

WAGERS.

Vide AGREEMENT 19, 20.

WILLS.

Vide ante, 95, 123, and 214.

WITNESS.

1. The examination, by the plaintiff, of his assignor of the cause of action, does not, as the code read in October, 1855, authorize a defendant to be examined in his own behalf, except as to the same matter. *Brown v. Richardson.* 402
2. *Held*, that as he offered himself, as a witness, "generally on his own behalf," and as the offer was understood and treated by the Court and counsel as an offer to examine him on matters, as to which the assignor had not been examined, or not at all, the offer was properly excluded. *id.*
3. A defendant has no right to be examined in his own behalf, merely because the wife of the plaintiff's assignor of a thing in action (being the plaintiff's cause of action) has been examined for the plaintiff. *Hanford v. Higgins.* 441
4. In all actions, whether of contract or tort, whenever a plaintiff calls one of several defendants, and by examining him gives evidence tending to establish a cause of action against all jointly, and by establishing which all may be charged with the same amount for which either, on the same facts, would be liable if sued alone, the other defendants may be examined, as witnesses in their own behalf, to the same cause of action. *Kilmer v. O'Hara.* 601
5. It will make no difference, that the Court may be competent in such action and on such facts, in the exercise of its equitable jurisdiction, to charge the defendants so offering themselves in their own behalf to pay a part only of the whole sum claimed, or if charged with the whole, to direct that they be so charged only in the event that all cannot be collected of their co-defendant, and to order that they pay only so much as may not be collected by execution against him. *id.*
6. Defendants may be "united in interest," in respect to a matter involved in the issues, within the meaning of those words as used in § 397 of the Code, though not sued as partners or joint-contractors, and though sued upon a cause of action on which a separate suit against each could be maintained. *id.*
7. There is no authority in the provisions of the Code concerning the examination of a party as a witness, at the instance of the adverse party, for an order directing the party sought to be examined to appear before a referee and submit to be examined before such referee. *Draper v. Henningsen.* 611
8. *Semble.* If the examination is to be as of a witness examined conditionally, a summons must be issued to compel the attendance of the party whose examination is sought. An order is only necessary to show the existence of facts giving a right to so examine, and to authenticate the proceedings. The witness does not attend in obedience to the order, but in obedience to the summons. If the examination is had before, instead of taking it at the trial, no order is necessary. A notice to the party, and that alone, is necessary to give the right to examine, and a summons is necessary to compel attendance and lay the foundation for ulterior proceedings, in case of non-attendance in obedience to it. *id.*
9. It is not obvious that any order for the conditional examination of a party as a witness can, properly, specify and limit the matters to which he is to be examined. He is to be examined generally the same as any other witness, and the points to which he may be examined are to be determined by the officer before whom the examination is had, or at the trial when the testimony is offered in evidence. *id.*
10. Whether, when in an action against husband and wife, the complaint states as a cause of action, facts which, if proved, will entitle the plaintiff to a judgment against the husband personally, and he has not been served with

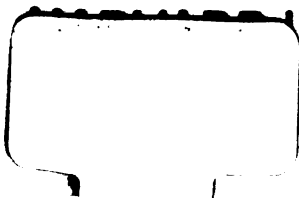
the summons, nor appeared in the action, and the means provided by law for compelling his appearance have not been exhausted, the wife can be proceeded against at all, or whether she can appear by an attorney employed by her, without a previous order of the Court for that purpose, or whether she

can be compelled to be examined at all to establish the allegations in such a complaint, when proof of part of the allegations requisite to be proved, to charge her separate estate, if she have any, will subject the husband to a judgment for the amount sought to be collected from her property, *quære? id.*

Edw. A. S. J.

END OF VOL. I

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